# INDIRECT ENCROACHMENT ON FEDERAL AUTHORITY BY THE TAXING POWERS OF THE STATES.[1] III

## II. REGULATIONS OF INTERSTATE COMMERCE (*continued*)

### 2. *Taxes not Discriminating against Interstate Commerce* (continued)

#### A. TAXES ON PRIVILEGES (*concluded*)

#### (*c*) *State Decisions Subsequent to the Western Union Case*

PRIOR to 1910 the states had good grounds for assuming that they might impose such excises as they pleased on the franchises of domestic corporations [2] or on the privileges of foreign corporations to enter the state to carry on domestic commerce.[3] The prevailing judicial thought seemed to be that, since these were privileges that the state might withhold, it therefore followed as the night the day that they were privileges which, when granted, the state might tax as it willed. But in *Western Union Telegraph Co.* v. *Kansas*,[4] the Supreme Court held that Kansas could not require a foreign corporation, doing a combined local and interstate telegraph business within the state, to pay for the privilege of doing local business a fee which was measured by its total capital stock.

Owing to the fact that the judges who composed the majority were not fully agreed on the reasons for the decision, it was difficult to state the exact proposition of law for which the case stood. It was clear, however, that the case cracked the doctrine, previously prevailing, that the power of a state to exclude foreign corporations

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[1] For preceding installments of this discussion, see 31 HARV. L. REV. 321–72 (January, 1918) and 31 HARV. L. REV. 572–618 (February, 1918).

[2] State Tax on Railway Gross Receipts, 15 Wall. (82 U. S.) 284 (1872); Delaware Railroad Tax, 18 Wall. (85 U. S.) 206 (1873); Railroad Co. *v.* Maryland, 21 Wall. (88 U. S.) 456 (1874); Ashley *v.* Ryan, 153 U. S. 436, 14 Sup. Ct. Rep. 865 (1894). See 31 HARV. L. REV. 576–81.

[3] Maine *v.* Grand Trunk Railway Co., 142 U. S. 217, 12 Sup. Ct. Rep. 121 (1891); Pullman Co. *v.* Adams, 189 U. S. 420, 23 Sup. Ct. Rep. 494 (1903); Allen *v.* Pullman's Palace Car Co., 191 U. S. 171, 24 Sup. Ct. Rep. 39 (1903). See 31 HARV. L. REV. 579–80, 582–83.

[4] 216 U. S. 1, 30 Sup. Ct. Rep. 190 (1910). See 31 HARV. L. REV. 584–94.

from intra-state commerce within its borders, carried with it absolute discretion in imposing taxes on those admitted to carry on such commerce. It was apparent, too, that the new departure was influenced by the character of the business in which the complaining corporation was engaged. Mr. Justice White, whose opinion proceeded mainly on an application of the due-process clause, stated that "the continued beneficial existence of the investment depends upon the right to use the property . . . for both interstate and local business." [5] If the local business is given up in order to avoid a tax measured by property outside of the state, "the property established for the purpose of doing local business becomes worthless and is in effect confiscated." [6] And Mr. Justice Harlan said that the "state knows that the Telegraph Company, in order to . . . make its telegraphic system effective, must do all kinds of telegraph business." [7]

Later in *Baltic Mining Co.* v. *Massachusetts* [8] Mr. Justice Day observed that in the Kansas cases "the business of both complaining companies was commerce, the same instrumentalities and the same agencies carrying on in the same places the business of the companies of state and interstate character." [9] The Baltic Case involved two corporations each of which was said to be "carrying on a purely local business, quite separate from its interstate transactions." [10] In this case the court sanctioned the imposition of a tax on a foreign corporation for the privilege of conducting local business, which tax, though measured by total capital stock, could not, under the terms of the statute, exceed $2,000. It was impossible to tell from the opinion just what weight the court gave respectively to this provision for a maximum and to the fact that the local business was separate and distinct from the interstate business. But Mr. Justice Day thought it material to mention that the "local and domestic business is real and substantial, and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business." [11]

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[5] 216 U. S. 1, 50, 30 Sup. Ct. Rep. 190 (1910). See 31 HARV. L. REV. 587.

[6] *Ibid.*

[7] 216 U. S. 1, 37, 30 Sup. Ct. Rep. 190 (1910). See 31 HARV. L. REV. 591.

[8] 231 U. S. 68, 34 Sup. Ct. Rep. 15 (1913). See 31 HARV. L. REV. 594–96.

[9] 231 U. S. 68, 85, 34 Sup. Ct. Rep. 15 (1913). See 31 HARV. L. REV. 595, note 89.

[10] 231 U. S. 68, 86, 34 Sup. Ct. Rep. 15 (1913). See 31 HARV. L. REV. 595–96, note 89.

[11] *Ibid.*

It is to be observed that the learned justice said "*a* tax," and did not restrict his comment to the particular tax in question. Hence, after the Baltic Case, a state had considerable warrant for the inference that taxes on the local business of foreign corporations might be measured by their total capital stock, if the local business was of a kind that might be easily separated from the interstate business, and was not, like the railroad and telegraph business, so tied up with the interstate business by joint use of the same physical facilities that the abandonment of the local business would not proportionately reduce operating costs. But since, in addition to the difference between the business involved in the Massachusetts case and that involved in the Kansas case, there was the further difference in the statutes with respect to the provision for a maximum, no state court could be certain that the Supreme Court would sanction the measure of total capital stock with no maximum limit, even when applied to a local business easily severable from an interstate business. The decisions of the Supreme Court left the question open, and the opinions of the justices did not fill the gap with any distinct announcement. This much, however, was clear. The Baltic Case did not overrule the Western Union Case. It recognized the authority of the earlier decisions, but distinguished the case before it on the two grounds that the tax and the business on which it was imposed both differed from those involved in the Western Union Case and those following it [12] in which the states were held to have exceeded their powers.

The Western Union Case and the Baltic Case gave the state courts much food for thought. From the difficulties which beset them, it is apparent that the Supreme Court had failed to make clear the precise extent to which the Western Union Case had qualified the doctrine of prior decisions, and the extent to which the Baltic Case limited the inferences which might be drawn from the Western Union Case. This obscurity was not cleared up during the period in which were decided the state cases to be reviewed. It is perhaps too much to say that even now the light shines bright. True, on December 10, 1917, the Supreme Court decided in *Looney*

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[12] Pullman Co. *v.* Kansas, 216 U. S. 56, 30 Sup. Ct. Rep. 232 (1910); Ludwig *v.* Western Union Telegraph Co., 216 U. S. 146, 30 Sup. Ct. Rep. 280 (1910); Atchison, T. & S. F. R. Co. *v.* O'Connor, 223 U. S. 280, 32 Sup. Ct. Rep. 216 (1912). See 31 HARV. L. REV. 587–94.

v. *Crane Co.*[13] that a foreign corporation making local and interstate sales within the state could not be required to pay for the privilege of conducting local business a fee measured by total capital stock with no maximum limit. The case was treated as within the doctrine of the Western Union Case, but it was recognized that special circumstances had excluded the Baltic Case [14] and others [15] from that doctrine. It may therefore be assumed that special circumstances may take other cases out of the doctrine of the Western Union Case. Prior to the Looney Case the opinions of the Supreme Court had emphasized that every decision of the question at issue must depend on its own facts.[16] The existence of a general rule was denied. The opinion in the Looney Case, however, seems to lay down a general rule that no tax may be measured by any elements of value on which a direct tax may not be imposed. But this general rule is not applied to taxes on the franchises of domestic corporations,[17] and its generality is therefore suspect. Not of course that the rule itself is subject to exceptions, but that special circumstances may exclude particular cases from coming within it. For a complete enumeration of such special circumstances we shall have to wait until the Supreme Court has run with precision the line between what falls within the doctrine, and what without. Meanwhile state courts may still seek to differentiate cases before them from the Looney Case. It seems unlikely, however, that the Supreme Court will deal kindly with any state tax on foreign corporations engaged partly in interstate commerce, if the tax is measured by total capital stock without having a fixed limit of a reasonable amount.

The state cases to be discussed are of course to be judged in the light of what the Supreme Court had declared before they were decided. The two courts which had the greatest difficulty were those of Montana and California. With every desire to follow the Supreme Court whithersoever it might lead, the supreme courts of

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13 245 U. S. 178, 38 Sup. Ct. Rep. 85 (1917). See 31 HARV. L. REV. 600–18.

14 Note 8, *supra*.

15 St. Louis S. W. Ry. Co. *v.* Arkansas, 235 U. S. 350, 35 Sup. Ct. Rep. 99 (1914); Kansas City, F. S. & M. R. Co. *v.* Botkin, 240 U. S. 227, 36 Sup. Ct. Rep. 261 (1916); Lusk *v.* Botkin, 240 U. S. 236, 36 Sup. Ct. Rep. 263 (1916). See 31 HARV. L. REV. 594–600.

16 See 31 HARV. L. REV. 595, 598, 600.

17 Kansas City, M. & B. R. Co. *v.* Stiles, 242 U. S. 111, 37 Sup. Ct. Rep. 56 (1916). See 31 HARV. L. REV. 599–600.

these two states found the path dimly lit. A review of their wanderings may perhaps shed some additional light on the controlling considerations which guided the Supreme Court, and may at the same time suggest how the Supreme Court might have indicated somewhat more clearly what those considerations were. It will appear that the chief cause of the distress under which the Montana and California courts labored was the failure to appreciate that the Supreme Court was deciding only the particular cases before it, and was, according to its professions, influenced by the characteristics of the business involved as well as by the provisions of the statutes. The fact that recently in the Looney Case the Supreme Court appears to be finding a yardstick which will apply indiscriminately to all kinds of business, does not require us to forget that previously the court did not fix its attention exclusively on the language of the statutes.

## I

The first case to come before the Montana court was *Chicago, M. & St. P. Ry. Co.* v. *Swindlehurst*,[18] which held invalid a requirement that foreign corporations should pay fees, graduated according to capital stock, for filing with the designated state officer copies of their charter, or of certificates for increase of their capital. The complainant was an interstate railroad, chartered by Wisconsin, which was desirous of purchasing the property of an interstate railroad chartered by Washington, and carrying on both local and interstate business in Montana. Neither the statute nor the business could be differentiated from those involved in the cases on the Kansas and Arkansas statutes in the Supreme Court. The only point of difference is thus stated and dismissed in the opinion of the Montana court by Brantly, C. J.:

> "Some effort was made by counsel for appellant to maintain the contention that in each of the cases cited the question involved was whether the corporations which were already doing business in the state should be excluded therefrom; whereas in this case the question is whether a corporation shall be permitted to come into the state to engage in business. A reading of these cases, however, leads to the conclusion that this difference in the situation of the parties cannot affect the result." [19]

[18] 47 Mont. 119, 130 Pac. 966 (1913). [19] 47 Mont. 119, 126–27, 130 Pac. 966 (1913).

That this interpretation was warranted can hardly be denied. Yet it is also true that a state court less willing to accept the new doctrine of the Supreme Court might have taken the position that, since both Mr. Justice Harlan and Mr. Justice White laid stress on the fact that the Western Union Company and the Pullman Company had been in the state for a considerable time, carrying on all kinds of business, and had acquired property of a permanent nature, the cases excusing them from the Kansas and Arkansas taxes did not apply to a corporation which was outside the state, asking to be let in. So far as the actual decisions of the Supreme Court go, the doctrine of the Western Union Case has not yet been applied to a foreign corporation still on the threshold. In the Looney Case [20] the complainant had been doing business in the state for over ten years and had acquired two warehouses in the state. The Stiles Case [21] established that the Western Union doctrine does not apply to a domestic corporation created after the passage of the law objected to.

If the doctrine of the Western Union Case applies to a foreign corporation when first knocking at the door, it would seem that there must also be a doctrine that a state cannot exclude from local business a foreign corporation seeking to come in to do a combined local and interstate transportation business. For it would be absurd to permit a state to forbid local business, if it cannot charge what it pleases for permission to enter the state to engage in such business. It would seem that Mr. Justice Holmes must agree with this, for his dissent was based on the converse proposition that it was absurd to deny to a state the power to tax local business as it pleases, if the state may forbid such business.[22] If the Supreme Court follows the Montana court, it should go a step further and declare that a foreign corporation, seeking to engage in interstate transportation within a state, cannot be prevented from entering to carry on domestic commerce, if the conduct of such domestic commerce is essential to the satisfactory and economical conduct of interstate commerce.

The Montana statute involved in the Swindlehurst Case came before the Montana court again in *State* v. *Alderson*.[23] The complainant was the General Electric Company, and the business

[20] Note 13, *supra*.

[21] Note 17, *supra*.

[22] See 31 HARV. L. REV. 585–86.

[23] 49 Mont. 29, 140 Pac. 82 (1914).

which it sought to do in Montana was held to be a "strictly private, intra-state business." In the interim between the Swindlehurst Case and this case, the United States Supreme Court had decided the Baltic Case. The Alderson Case is not important for the actual point which it decides, for it is based, not on the distinction between the Western Union Case and the Baltic Case, but upon the fact that the General Electric Company did not enter for interstate commerce at all, and upon the rule of law that therefore its claim of exemption was foreclosed by *Paul* v. *Virginia* [24] and *Hooper* v. *California*.[25] The Baltic Case was referred to as possibly qualifying the rule of *Paul* v. *Virginia* to the extent that, though the state may entirely exclude a foreign corporation seeking to do only local business, it must not do so conditionally, if the condition imposed is bad *per se*.[26] After quoting from the opinion in the Baltic Case, Judge Holloway adds:

"Whatever may finally be determined to be the extent of state control over a foreign corporation situated as relator is, we are satisfied that the exaction demanded in this instance does not infringe upon any right of this relator which is guaranteed to it by the Constitution of the United States, and that the state may rightfully say: You may come into this state and engage in local, private business only on condition that you pay the fee required under section 165 above. *Kehrer* v. *Stewart*, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663; *Allen* v. *Pullman Co.*, 191 U. S. 171, 24 Sup. Ct. 39, 48 L. Ed. 134; *Pullman Co.* v. *Adams*, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. Ed. 877." [27]

From other language in the opinion, it seems that the Montana court thought that the Supreme Court meant in the Western Union Case to declare that an excise fee on a foreign corporation, doing interstate commerce of any kind within the state, was a property tax if measured by property, and that in the Baltic Case the Supreme Court receded from that position, and held that an

[24] 8 Wall. 168 (1869).

[25] 155 U. S. 648, 15 Sup. Ct. Rep. 207 (1895).

[26] Since the decision of Looney *v.* Crane Co., note 13, *supra*, we know that this is the declared doctrine of the Supreme Court with reference to state taxation of a foreign corporation manufacturing goods in other states and making local and interstate sales within the state. It is possible, too, that the Supreme Court may in time extend its expanding doctrine to foreign corporations doing only intra-state commerce within the state. For the Looney Case purported to be based on the due-process clause as well as on the commerce clause. See 31 HARV. L. REV. 603, 613.

[27] 49 Mont. 29, 37, 140 Pac. 82 (1914).

excise tax measured by property would not be a property tax.[28] Speaking for the court, Judge Holloway says:

"We are unable to appreciate the distinction attempted to be made by the Supreme Court of the United States between the Kansas statute, considered in *Western Union Tel. Co.* v. *Kansas*, above, and held to impose a general tax upon all the property of the company, and the statute of Massachusetts, considered in *Baltic Mining Co.* v. *Massachusetts* . . . and held to be a mere excise; but, if we have accurately characterized our section 165 above, the latest pronouncement by that court justifies the existence of our statute and the method employed for determining the amount of the tax. It may be that our legislation is unwise in failing to fix a reasonable limit upon the amount to be exacted from any one corporation; but, if the authority is lodged in the state to exclude the relator altogether or to impose such terms to its admission here as may seem expedient, then the amount of the fee affords no tenable ground of opposition to the validity of the statute. If the amount demanded is more than the local, private business of relator will justify it paying, the tax can be avoided altogether by a renunciation of its intention to do such business. The state does not seek to compel it to engage in business here, nor does it attempt to collect this fee in the sense that property taxes or ordinary debts may be enforced. It merely says to the relator: You may engage in local, private business in Montana if you conform to the conditions imposed; otherwise you must stay out." [29]

It is possible, however, that the Montana court appreciated one of the distinctions between the Western Union Case and the Baltic Case without appreciating that it so appreciated it. For throughout the opinion it refers to the business of relator as private and intra-state. The reference to the fact that the business was private distinguishes it from the transportation business which employs the same facilities in intra-state and interstate commerce. On the other hand, there is evidence that the Montana court thought this distinction of no importance. For, in dealing with the contention of the complainant in the Alderson Case that the Swindlehurst Case had declared section 165 unconstitutional, and that, therefore,

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[28] This seems to be a misconception. The Supreme Court did not differentiate the two cases on the ground that one involved a property tax, and the other an excise tax, but on the ground that one involved an invalid excise tax, and the other a valid one. The reasons given why the later Massachusetts excise was valid included the provision for a maximum, and the character of the particular business on which the tax was imposed.

[29] 49 Mont. 29, 34–35, 140 Pac. 82 (1914).

the secretary of the state was without authority to demand any fees thereunder, it conceded that its language in the earlier case was not apposite, since it seemed to imply that the fee could not be demanded of any foreign corporation, and it adds:

> "To have been technically exact, we should have said in the Swindlehurst case that section 165 does not have any application to foreign corporations seeking to engage in interstate commerce in this state. This is our holding, and, thus stated, the statute is left intact to apply to foreign corporations over which this state has the right to exercise some degree of regulation or control." [30]

The Montana court therefore construes the words, "every foreign corporation," contained in section 165 so as to apply only to foreign corporations not engaged in interstate commerce, under the familiar principle that a statute will if possible be so construed as to render it constitutional. Thus the Montana statute is assumed to be inapplicable to any foreign corporation engaged in any kind of interstate commerce within the state. In this the Montana court foreshadowed the decision of the Supreme Court in *Looney* v. *Crane Co.*[31] But the Montana court did not base its belief on the failure of the Montana statute to set a maximum to the annual charge, as is evident from its declaration that "the amount of the fee affords no tenable ground of opposition to the validity of the statute." [32] So the Baltic Case is evidently given no effect with respect to corporations engaged in interstate commerce. There is therefore considerable evidence that the Montana court was correct in its assertion that it failed to appreciate the distinction between the Western Union Case and the Baltic Case.

The Montana supreme court was not the only one perplexed by the Western Union Case and those following it. In *H. K. Mulford Co.* v. *Curry* [33] the California supreme court had to deal with a statute requiring foreign corporations to pay a fee measured by total capital stock for filing with the secretary of state copies of certain documents, whose filing was a condition prerequisite to doing business in the state. The complaining corporation was a manufacturer and seller of medicines with its principal place of business in Philadelphia. It maintained a branch house in San

[30] 49 Mont. 29, 39, 140 Pac. 82 (1914).
[31] Note 13, *supra*.
[32] 49 Mont. 29, 34, 140 Pac. 82 (1914).
[33] 163 Cal. 276, 125 Pac. 236 (1912).

Francisco from which it filled orders from California and neighboring states, so that in California it was engaged in both intra-state and interstate commerce. The opinion of the court by Judge Henshaw states the doctrine of the Western Union and Pullman cases[34] without any reference to the kind of business in which the corporations there protesting were engaged, except that it was both intra-state and interstate commerce. He mentions the fact that the Supreme Court decisions were rendered by a bare majority of a sharply divided court, and says that the "decision of the case at bar was deliberately delayed to note whether any recession from the views expressed in those cases would follow from the change in the personnel of the court." [35] But instead of a recession, he adds, the doctrine was affirmed by an undivided court in *Atchison, Topeka and Santa Fe R. R. Co.* v. *O'Connor*.[36] And then he says of the case before him:

> "The minutest investigation and the most careful consideration fail to disclose any ground upon which the case here at bar may be distinguished from those cited. The legal parallelism between this case and that of *Ludwig* v. *Western Union Telegraph Co.*, . . ., is perfect. Both corporations were engaged in *inter* as well as *intra*-state business. Both were so engaged before the passage of the excise law in question." [37]

Then follows a review of the Ludwig Case,[38] and the statement that the parallelism between it and the case at bar is so perfect "as to render futile any attempt to distinguish them, and thus to save the California laws." [39]

The opinion next proceeds to discuss the effect of the Supreme Court decisions on other applications of the state statute than the one involved in the case before the court. This is prefaced by a reference to the "further duty" of the court "in pointing out for future legislative action the limitations upon the power of the state in dealing with foreign corporations." [40] It is then set forth that the principle of the Western Union Case must apply to a domestic, as well as to a foreign, corporation engaged in combined intra-state and interstate commerce, since, if regulation which is unlawful when separately considered cannot be justified as the

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[34] Notes 4 and 12, *supra*.

[35] 163 Cal. 276, 282, 125 Pac. 236 (1912).

[36] Note 12, *supra*.

[37] 163 Cal. 276, 282–83, 125 Pac. 236 (1912).

[38] Note 12, *supra*.

[39] 163 Cal. 276, 284, 125 Pac. 236 (1912).

[40] 163 Cal. 276, 285, 125 Pac. 236 (1912).

price of one privilege, it cannot be justified as the price of another. "The attention of the Legislature is thus directed to the fact that the law in question can apply only to domestic corporations nowhere engaged in interstate business, and to foreign corporations seeking to enter the state solely to do domestic business." [41]

Judge Henshaw next points out that in the Western Union Case and the Pullman Case the Kansas statute was held unconstitutional under the Fourteenth Amendment as well as under the commerce clause. From this he concludes that a state cannot tax a foreign corporation engaged solely in *domestic* commerce by any method which results practically in taxing property without the state, "and therefore beyond the jurisdiction of the taxing power of the state." [42] Thus the Supreme Court is taken to mean that under no circumstances can a state exact, even as the price of some privilege which it might withhold, any imposition which would be improper as a simple tax on property or on an occupation.

"These constitutional questions thus decided are, as we have pointed out, in no way correlated, but are entirely separate and distinct. It is but the indulgence of futile and unwarranted speculation to say that the Supreme Court of the United States would call in the fourteenth amendment to the aid of a foreign corporation doing an interstate business to overthrow a state tax law, and would not invoke it in the case of a foreign corporation engaged in purely domestic business, notwithstanding that the tax upon the capital stocks of the foreign corporations (and thus the tax upon the property without the jurisdiction of the state) was, in both instances, identically the same. Nor can relief be found in a refusal to call such a license fee a tax. A state court may call it a fee or an exaction or a regulation; but the Supreme Court of the United States will call it a tax if, in its effect, it partake of the nature of a tax." [43]

After this decision, the Supreme Court declared in *Baltic Mining Co.* v. *Massachusetts*[44] that foreign corporations engaged in certain kinds of business could be subjected to a limited annual excise measured by total capital stock for the privilege of engaging in domestic commerce, even though such corporations were also engaged in interstate commerce. Two years later in *Albert Pick*

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[41] 163 Cal. 276, 286, 125 Pac. 236 (1912).
[42] 163 Cal. 276, 287, 125 Pac. 236 (1912).
[43] 163 Cal. 276, 288–89, 125 Pac. 236 (1912).
[44] Note 8, *supra*.

& Co. v. *Jordan*,[45] the California supreme court again passed on the California statute imposing on foreign corporations an annual excise measured by total capital stock. The complaining corporation manufactured ceramic articles in Chicago. It had a branch house in San Francisco, from which sales were made to purchasers in California and neighboring states. It was compelled by the California court to pay the annual excise measured by its total capital stock. Judge Henshaw was well aware that this decision violated the advice to the legislature given in his previous opinion in the Mulford Case,[46] though the judgment in that case related to the original charter fee, and not to the annual excise.. The basis for the change of doctrine was the intervening decision of the Supreme Court in the Baltic Case.

Judge Henshaw reviews at length the Supreme Court decisions prior to the Mulford Case, and states that he and his colleagues had concluded from those decisions that "the Supreme Court meant and declared, for the indicated reasons, that the method of charging a fee upon foreign corporations for the right to do a local business on or based on the total capital stock of such corporations was forever inhibited. . . ."[47] Reference is then made to the dissenting remark of Mr. Justice Holmes, expressing his curiosity as to what objection could be raised to a specific tax of the same amount as that reached under the computation required by the Kansas statute,[48] and answer is essayed as follows:

"We believed that the answer would be, as above indicated, that it was not the *amount* of the charge which determined the invalidity, but the fact that in its form the charge was laid upon property without the taxing power of the state, and that to submit to the payment of it in such a form (that is, a tax on all the capital stock) would be to force the surrender upon the part of the corporations of their well-defined constitutional rights.[49]

"These, then, were some of the conclusions which we drew from the decisions of the Supreme Court, and which, with more or less completeness, we sought to declare in *Mulford Co.* v. *Curry*. One part of the

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[45] 169 Cal. 1, 145 Pac. 506 (1915).

[46] Note 33, *supra*.

[47] 169 Cal. 1, 16, 145 Pac. 506 (1915).

[48] Quoted in 31 HARV. L. REV. 594.

[49] 169 Cal. 1, 16, 145 Pac. 506 (1915). Continuing, Judge Henshaw says: "Thus, if a man who is on his way to church to give a hundred dollars to charity is robbed of that hundred dollars by a highwayman, his financial condition is exactly the same as it would have been had he carried out his purpose. Yet it will not be said that this fact leaves him uninjured and without grievance."

judgment of the Supreme Court we conceived to be apodictic, and that was that all the capital stock of such a corporation could not be subjected to any tax without doing violence to the Constitution of the United States, and it was under this conviction that we sought in *Mulford Co.* v. *Curry* to enlighten our legislative department as to the danger which would attach to all laws basing license fees of a foreign corporation on this method of taxation." [50]

But this understanding of the doctrine of the Supreme Court was succeeded by confusion after its decision in the Baltic Case. Judge Henshaw refers to the reasons given by the Massachusetts court for not applying the Western Union doctrine to the Massachusetts statute and the corporations complaining against it. These were (1) the fact that the Massachusetts statute, unlike that of Kansas, fixed a maximum to the annual imposition, and (2) the further fact that the corporations resisting the law of Kansas were common carriers, whose "local business could not be given up without impairing their capacity to transact their interstate business," [51] while the Massachusetts statute did not apply to common carriers nor to corporations engaged solely in interstate commerce, "nor yet to corporations carrying on both interstate and domestic commerce, whose domestic or intra-state business was conducted in such close connection with the other that it could not be abandoned without serious impairment of the interstate business." [52]

With evident amazement Judge Henshaw notes that the "Supreme Court of the United States adopts without reservation the determination of the Supreme Court of Massachusetts that this fee is an excise tax as distinguished from a property tax." [53] He says, however, that "it by no means follows that, being an excise tax, this is conclusive that it is not levied upon property." [54] He does not see how it is relieved from the "condemnation imposed upon the Kansas statute for attempting to do the same thing by fixing or basing its tax on the total capital stock of the corporation." [55] The limitation of the amount exacted in any one year seems to him immaterial, since, if "the principle upon which its tax is based is a sound one, it may to-morrow increase the amount

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[50] 169 Cal. 1, 17, 145 Pac. 506 (1915).
[51] 169 Cal. 1, 18, 145 Pac. 506 (1915.)
[52] 169 Cal. 1, 19, 145 Pac. 506 (1915).
[53] *Ibid.*
[54] *Ibid.*
[55] 169 Cal. 1, 20, 145 Pac. 506 (1915).

of the tax to any extent." [56] Nor does Judge Henshaw appreciate the force of the distinction between the business of a common carrier and that of manufacturing and selling goods.

> "It is true that in the earlier cases the corporations involved were common carriers, and the Supreme Court of the United States makes mention of that fact in the Dental Case, but it does not say that this consideration influenced or was determinative of the controversy. To the contrary, it does say that all corporations engaged in interstate commerce are under the equal protection of the commerce clause of the Constitution, and, indeed, no distinction between them can justly be drawn. If it is important that common carriers — the instrumentalities by and through which commerce is conveyed — shall be protected from unwarranted burdens, it is equally necessary that the owners of the commerce to be conveyed should receive a like protection. While interstate commerce would unquestionably be vitally impaired if common carriers were eliminated, interstate commerce would be totally destroyed if the goods, wares, and merchandise embraced within the meaning of the word were debarred from interstate and foreign transportation." [57]

The California court concedes that the deprivation of the local business of common carriers is "an injury and impairment of their business as a whole," [58] but it insists that "this is equally true of every commercial corporation likewise engaged in interstate and domestic business." [59] Of course in this the California court is mistaken, if, by "equally," it means "to the same extent." If the S. S. White Dental Manufacturing Company were taxed for its local business in Massachusetts so heavily that the local business was unprofitable, it might close its local branch, reduce thereby its expenses, and then make its Massachusetts sales through solicitors from its Philadelphia office, filling from the Philadelphia warehouses all orders obtained through such solicitors. Closing down the domestic business would increase the interstate business, and the interstate business would be immune from state interference. If the common carrier gives up local business, it cannot accommodate its would-be patrons by carrying them or their goods across state lines, for that would not meet their needs. Moreover, the abandonment of the local business of a common carrier will not be followed by any such proportionate reduction

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[56] 169 Cal. 1, 20, 145 Pac. 506 (1915). [57] *Ibid.*
[58] 169 Cal. 1, 21, 145 Pac. 506 (1915). [59] *Ibid.*

in operating costs as ensues from the closing of the local sales office of a foreign corporation engaged in manufacture and sales.

It is because of this failure to recognize the significance of the economic integration of domestic and interstate business which uses the same facilities for both, and needs nearly as extensive facilities for either as for both, that the California court says of the opinion of the Supreme Court in the Baltic Case:

> "Again, we fail to perceive how every word of this might not equally well have been said in the Western Union Telegraph Company Case, thus forcing the irresistible conclusion that the Supreme Court has receded from the position which it took, and has abandoned the views which it expressed in that and the like cases." [60]

But Judge Henshaw assumes that this interpretation of the Baltic Case is incorrect, since he is "confronted in the same opinion with the declaration of the court that it has 'no disposition to limit the authority of those cases.'" [61] With becoming modesty and pleasing humor he adds:

> "We are constrained to admit our inability to harmonize this language and these decisions, though we make haste to add that undoubtedly the failure must come from our own deficient powers of perception and ratiocination, and for this deficiency it is no consolation to us to note that our Brethren of the Supreme Court of Montana are similarly afflicted." [62]

The intellectual difficulties of the California court were enhanced by their acceptance of the language of the Supreme Court in the Western Union and Pullman cases as a declaration of absolute and universal principles, when, in reality, that language had particular reference to the results of applying the particular statute before the court to the particular business of the particular complainants. It may well be that the judges of the Supreme Court must accept some of the responsibility for being misunderstood by their brethren in the state courts. Certainly the *dictum* of Mr. Justice Harlan in the Western Union Case, with reference to a domestic corporation soliciting orders for goods manufactured in other states,[63] would justify the assumption that he, and the

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[60] 169 Cal. 1, 24, 145 Pac. 506 (1915).

[61] *Ibid.*

[62] *Ibid.* Judge Henshaw then quotes the excerpt cited above in note 29.

[63] Quoted in 31 HARV. L. REV. 591–92, note 71.

three, and possibly, four, judges who agreed with him, were announcing the doctrine that no imposition could be justified as the price of any privilege, unless the same imposition would be entirely proper as a simple property or occupation tax. This is also the inference to be drawn from the latest declaration of the Supreme Court in the Looney Case.[64] But in seeking to understand judicial opinions we must not confuse a *façon de parler* with a *ratio decidendi*. There was enough emphasis put upon the character of the business in the Western Union Case to invite any state court to appreciate that the broad declarations scattered through the opinions did not apply *ex proprio vigore* to other kinds of business or to modified forms of the Kansas statute. The Massachusetts court realized this and drew distinctions[65] which were later ratified by the Supreme Court in the Baltic Case.[66] That ratification made it clear that the mere flavor of total capital stock would not of necessity make an excise on foreign corporations unpalatable to the Supreme Court. But even then the Montana and California courts did not understand what was incubating. They were searching for a sign. They saw recent developments as doctrine and not as a way of adjustment. And as doctrine the decisions exemplified the work of Scriabine rather than of Mozart. The Stiles Case[67] and the Looney opinion, when heard together, make the dissonance of doctrine complete. After the Looney opinion, the courts of Montana and California must be pardoned, even if they cannot be exonerated. But the pardon, it is to be feared, will afford no more consolation to Judge Henshaw of the California court than did the fact that his "Brethren of the Supreme Court of Montana [were] similarly afflicted."[68]

## II

The supreme court of Idaho, however, did not suffer from the same affliction as its neighbors. In *Northern Pacific Railway Co. v. Gifford*,[69] handed down after the Supreme Court's decision in the Baltic Case, the Idaho court evinced its insight into what was going on. The Gifford Case involved a statute imposing on foreign

[64] Note 13, *supra*.

[65] In the cases cited in note 76, *infra*.

[66] Note 8, *supra*.

[67] Note 17, *supra*.

[68] 169 Cal. 1, 24, 145 Pac. 506 (1915). The passage is quoted on page 735, *supra*.

[69] 25 Idaho 196, 136 Pac. 1131 (1913).

as well as domestic corporations, for the privilege of doing local business within the state, an annual tax graded in accordance with the total capital stock and limited to $150. The complainant was a foreign corporation running an interstate railroad which urged that its local business was done at a loss instead of a profit. The Idaho court ruled that the Idaho statute was "freer from objection than the Massachusetts statute" sustained in the Baltic Case, because the maximum imposition was so much less. Ailshie, C. J., after reviewing the state and federal cases, observed that the court was convinced "that the supreme court intended to determine the *effect* of the statute as it will apply in *actual practice*, rather than decide it upon the *theory* of *any* apprehended dangers which might flow from other similar legislation which might prove more exacting." [70] It was suggested that if the maximum fee under the Idaho statute had been $50,000 instead of $150, the Supreme Court "might hold that it unreasonably burdens interstate commerce, although the company has the alternative of abandoning its purely interstate business." [71] But the fee imposed in the present case was said to be "a trifle" and not susceptible of being a burden on interstate commerce. It was sanely observed that, if the domestic business was not worth paying a fee of $150 annually, the corporation "will not suffer by abandoning that business and confining itself only to its interstate business and *such business as necessarily attaches and pertains to its interstate traffic.*[72] The suggestion that under the state constitution "the respondent corporation as a common carrier could not decline or refuse to carry on its domestic or intrastate business" [73] was answered by pointing out that the constitution also provides that common carriers are subject to legislative control, and that it would be absurd to penalize a corporation for not carrying on intrastate commerce, if by reason of its refusal to pay the tax imposed thereon it had been forbidden to engage in such commerce.

Further evidence that the Idaho court appreciated the considerations which had guided the Supreme Court appears in the following comment on a quotation from the opinion of Mr. Justice Day in the Baltic Case.

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[70] 25 Idaho 196, 209–10, 136 Pac. 1131 (1913).

[71] 25 Idaho 196, 210, 136 Pac. 1131 (1913).

[72] *Ibid.*

[73] 25 Idaho 196, 210–11, 136 Pac. 1131 (1913).

"The foregoing excerpt reminds one of the impression he has after reading the Kansas cases, namely, that the really controlling consideration with the great jurist who wrote the majority opinion of the court in those cases was the fact that the amount of the excise or license fee laid upon the corporations by the statute of Kansas was so exorbitant and unreasonable that the companies would not likely have been able to pay the same and would have as an alternative been obliged to abandon their local or intrastate business if the statute had been upheld, and that the Kansas Legislature was in fact trying to tax the whole property of the corporation, and so the court concluded that it amounted to really laying a tax upon all the property of the companies, whether within or beyond the state, and had the effect of both interfering with *interstate commerce* and *taking the property* of the company *without due process of law*. No such charge can be justly laid against the Idaho statute. . . . The fee charged is a trifle; the maximum that can be charged upon the largest corporation which may enter the state being only $150." [74]

Thus the Idaho court saw that the question was one of substance rather than of form. Judge Ailshie did not, it is true, make specific reference to all the items that go to make up the substance. But since the corporation before the court was an interstate railroad, it would have been *obiter* in the particular case to discuss the question whether more favor might be shown to excises on corporations making sales than to those on corporations engaged in transportation. The maximum set by the Idaho statute was so small that the character of the business of the complaining corporation may well be disregarded. It is to be anticipated that, if the Idaho statute or a similar one comes before the Supreme Court, it will be applied to a transportation corporation as well as to a company engaged in selling merchandise. But the Supreme Court would certainly insist that the maximum must be considerably less than the $50,000 mentioned by the Idaho court.

If any state should graduate its maximum in accordance with the amount of the total capital stock or of the total assets, we should approach a situation where the tax was in fact measured by total capital or total assets. Yet there is good sense in varying the maximum according to the size and business of the corporation on which the tax is imposed. It is hardly to be expected that the Supreme Court would object to an amendment to the Massachusetts statute

[74] 25 Idaho 196, 207–08, 136 Pac. 1131 (1913).

sustained in the Baltic Case, by which the maximum was reduced for corporations having a smaller capital stock than that of the Baltic Mining Company or that of the S. S. White Dental Company. If a $2,000 maximum removed the stain of a reference to the capital stock of corporations having $2,500,000 and $1,000,000 of authorized capital respectively, and $10,776,000 and $5,711,718.29 of assets, it is hard to see how new spots would accrue by making the maximum $1,000 for corporations having $2,500,000 of assets, and correspondingly less for those whose resources were smaller. A court which took the contrary position would be insisting that the states not only *may*, as in the Baltic Case, impose proportionately heavier burdens on small corporations than on large ones, but that they *must* do so. For such is the necessary result of a rigid limitation on the amount of the tax, no matter how large the corporation. Yet, if the maximum varies with the size of the corporation, the tax is apt to vary with the amount of extra-state property of the several corporations subjected thereto, and with the volume of their total business. The practical situation under such circumstances might be substantially identical with that produced by a tax measured by total capital, with no maximum, but with an insignificant rate of levy. Yet it seems probable that the Supreme Court would apply the statute with varying limits, provided all were reasonable, and would decline to apply the one which reached the same result by an insignificant rate of levy.

In spite of the well-founded objections to efforts on the part of courts to settle questions that are not before them, some tolerance might be pleaded for a hankering to propound a series of questions to the Supreme Court in the hope of obtaining definitive and specific answers. We know that, in determining the validity of excises on foreign corporations engaged partly in interstate commerce, some maximum is necessary to wash away the sins of a statute that casts glances at the corporations' total capital stock. But we do not know how high the state may make its maximum. And the Supreme Court will have to tell us as the specific cases come before it. It cannot well do so with the type of formula brought forward in the opinion in the Looney Case. No such conceptual dichotomy can minister satisfactorily to a complex situation in which so many of the elements are in reality mutually interblended. It is attractive to believe that statutes can be divided rigorously into good and

bad by a sharp line of demarcation. But this is to invoke artificial simplicity in the presence of actual complexity. The court is not entrusted with the function of passing judgment on statutes *in vacuo* or as theses nailed to the wall. Its task is the less exalted and more difficult one of deciding whether the result of applying a particular statute to the particular state of facts involved in the case at bar is consistent or inconsistent with the requirements of the Constitution. A statute on the printed page, a statute is, and it is nothing more. It is not of necessity either good or bad. The court does not pass directly on the constitutionality of statutes, but on the propriety or impropriety of action taken under them. The application of a statute to one situation may give rise to problems entirely different from those presented by its application to another. A maximum which saves a tax from imposing an appreciable burden on interstate commerce, when levied on one corporation, may not, when levied on another. It was a counsel of wisdom which the Supreme Court adopted when it declared that every case on the subject under consideration must depend upon its own facts. The seeming departure from that attitude in the Looney Case points to a way of approach that cannot claim the same commendation.

This is not to censure the actual decision in the Looney Case. There is much to be said for a flat declaration that the measure of total capital stock must be accompanied by a proper maximum limit to the annual imposition. There is sense in not undertaking to pass judgment on the propriety of each particular rate of levy. But it is confusing to be told that, if the measure of the tax includes elements which cannot be taxed directly, the existence of the federal system is impeached, so long as we know that such measures are upheld in excises on domestic corporations, and have reason to infer from the Baltic Case that they would be upheld in excises on a foreign corporation whose capital is not sufficiently large to bring it within the shelter of the maximum set to the state's demands.

The all-embracing utterances of the Supreme Court bristle with riddles. Unless the state courts seek for the implications of the Looney Case outside of the broad language of the opinion, they will find themselves beset with the same difficulties as those which puzzled the courts of Montana and California. But the decision of

the Idaho court in the Gifford Case [75] shows that those difficulties are not insurmountable. The supreme court of Massachusetts also was able to grasp that the Supreme Court was feeling its way for a practical adjustment, and that its catholic statements were put forth as instruments rather than as the all-inclusive final truths which by their terms they seemed to declare. The Massachusetts decisions in the Baltic and White Dental cases [76] indicated this. The two subsequent cases of *Marconi Wireless Telegraph Co.* v. *Commonwealth* [77] and *International Paper Co.* v. *Commonwealth* [78] confirm it. The Marconi Case involved the application to nine foreign corporations of the statute upheld and applied in the Baltic Case. The International Paper Case involved this statute and a later amendment imposing on foreign corporations an additional excise of one one-hundredth of one per cent of the par value of authorized capital stock in excess of ten million dollars, with no maximum limit set. It may well be that, in this latter case, the Massachusetts court has sanctioned an adjustment which will be upset by the Supreme Court. But this need not detract from our satisfaction that the Massachusetts court has viewed its task as one of finding an adjustment, rather than one of setting up categories which profess to be mutually exclusive, when in fact the line which marks their boundaries is fuzzy, and each category inevitably contains certain particulars which lie partly within the other also.

None of the corporations concerned in the Marconi Case were common carriers, unless the Marconi Wireless Telegraph Company should be so regarded. That corporation was held to be not within the purview of the statute, because it "transacted no business of a domestic or local nature, except such as is inseparable from and necessarily incidental to its foreign commerce." [79] A similar ruling was made as to the business of the Pocahontas Fuel Company. Though it had an office in Boston, this office was merely the headquarters for salesmen who solicited orders from customers, and sent all orders to New York where they must be accepted and approved before a sale takes place.

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[75] Note 69, *supra*.

[76] Baltic Mining Co. *v.* Commonwealth, 207 Mass. 381, 93 N. E. 831 (1911); S. S. White Dental Manufacturing Co. *v.* Commonwealth, 212 Mass. 35, 98 N. E. 1056 (1912).

[77] 218 Mass. 558, 106 N. E. 310 (1914).

[78] 228 Mass. 101, 117 N. E. 246 (1917).

[79] 218 Mass. 558, 568, 106 N. E. 310 (1914).

The seven other corporations were all held subject to the tax. The Cheney Brothers Company used its Boston office for the storage and display of samples as well as headquarters for its sales force. The Lanston Monotype Company kept repair parts at its branch office in Boston, which were furnished to customers in Massachusetts. The test of amenability to the statute which the court applies will be apparent from the following quotation:

"These facts show the transaction of a very considerable local or intrastate business as distinguished from its interstate commerce. While there may be economies of management or advertising advantages arising from it in conjunction with the interstate business of the company, there is no necessary or inherent connection between the two. Because the interstate commerce may not be profitable except in connection with local business does not so interlock the two that they are inseparable. The protection afforded by the federal Constitution to interstate commerce against state excise taxation does not go to the extent of permitting one engaged in interstate commerce to compete in local business free from liability to an excise to the state merely for the sake of greater profit or even of making the difference between profit and loss in the business as a whole. Plainly this local business of replacing broken parts is conducted in a manner wholly distinct from the interstate business. The distinction is not whether a profit is made by the conjoining and a loss suffered by separating the intra-state and the interstate commerce, but whether the nature of the business is such that the company is free to renounce the domestic business if it chooses and still conduct its interstate commerce." [80]

In an earlier part of the opinion [81] Chief Justice Rugg had pointed out that complainants were placing a false reliance on the statement from the opinion of the Supreme Court in the Baltic Case, to the effect that the local and domestic business of the corporations there in issue was "real and substantial." [82] That, he says, "is nothing more than a statement that a shadow cannot be made the basis of an excise tax. . . .[83] But when the local and domestic business exists," he continues, "then an excise may be levied. There is nothing to indicate that a comparison between the

[80] 218 Mass. 558, 572, 106 N. E. 310 (1914).

[81] 218 Mass. 558, 566, 106 N. E. 310 (1914).

[82] 231 U. S. 68, 86, 34 Sup. Ct. Rep. 15 (1913). The passage is quoted in 31 HARV. L. REV. 595–96, note 89.

[83] 218 Mass. 558, 566, 106 N. E. 310 (1914).

total business of the company and its local business was intended. Such a basis has never before been intimated." [84] Some question must attach to this remark because of the succeeding statement that the contention of complainant is directly contrary to *Ficklen* v. *Shelby County*.[85] That case was based largely on the authority of *Maine* v. *Grand Trunk Ry. Co.*,[86] and the Maine Case was subsequently treated in *Galveston, H. & S. A. Ry. Co.* v. *Texas*,[87] as involving a statute imposing a tax which was partially in lieu of a property tax. Moreover, the Western Union Case casts considerable doubt upon the present standing of the Ficklen Case. The problem of occupation and property taxes will be treated later. The Ficklen Case went on the ground that the commerce clause set no limitations whatever to the taxation of domestic business, and that ground has certainly been since abandoned. Chief Justice Rugg may perhaps have some doubts as to the authority of the Ficklen Case, for after citing it, he says that if such a principle as contended for by complainants exists in reference to any facts, "it has no relation to any of the cases at bar." [88]

"The test is whether the foreign corporation transacts domestic business substantial in its essence and not by comparison, and reasonably susceptible of separation from its interstate commerce. If it does, the state can fix its own terms so far as license fee is concerned.

"The ratio of profits on the domestic business to the license tax is an immaterial circumstance. If the license fee imposed is general in its operation and is in other respects invulnerable, the mere fact that some foreign corporation may not be able to make profits enough to meet it does not render the law unconstitutional as to that corporation. The opportunity to do business, subject to the protection of our laws and with all the advantages which arise from our markets and our financial and other resources, is the thing which is made the subject of the excise." [89]

The remaining corporations came easily within the test thus laid down. The Northwestern Consolidated Milling Company

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[84] 218 Mass. 558, 566, 106 N. E. 310 (1914).

[85] 145 U. S. 1, 12 Sup. Ct. Rep. 810 (1892).

[86] Note 3, *supra*.

[87] 210 U. S. 217, 28 Sup. Ct. Rep. 638 (1908).

[88] 218 Mass. 558, 566, 106 N. E. 310 (1914). The doubt as to the authority of the Ficklen Case is enhanced by Crew Levick Co. *v.* Commonwealth, 245 U. S. 292, 38 Sup. Ct. Rep. 126 (1917).

[89] 218 Mass. 558, 566–67, 106 N. E. 310 (1914).

had seven agents at its Boston office, who solicited orders for flour from Massachusetts retailers, and then turned the orders over to Massachusetts wholesalers to fill. The fact that a natural result of filling such orders was to increase the complainant's interstate sales to the Massachusetts wholesalers was said to be immaterial. "It is too remote from the actual business of the plaintiff's salesmen to constitute that interstate commerce." [90] There were also some sales by plaintiff directly from its own local stock. The Copper Range Company was a holding company transacting no commerce of any kind. It merely received dividends from subsidiary corporations, and then paid dividends to its own stockholders. It was said that, though "the legal domicile of the plaintiff is in Michigan, its substantial home appears to be in this state, where its essential corporate faculties are exercised." [91] The Champion Copper Company owned a mine in Michigan. Its sales were made through its New York office. Boston was the seat of its financial management. In Boston were the offices of the president and treasurer. Five of its directors lived in Massachusetts, and the directors' meetings were held in that state. The court refers to the "interesting question" whether a corporation could manage all its interstate commerce in a state and still be exempt from a local excise, but holds that this is not the question at bar, for the "corporate activities conducted at Boston constitute a doing of business which has no direct relation to commerce." [92]

Another of the litigants, the White Company, an Ohio corporation manufacturing automobiles in Ohio and owning a garage in Boston, conceded that it was doing domestic business in Massachusetts, but it objected that the excise on foreign corporations was larger than when it was admitted to the state, and that it was therefore denied the equal protection of the laws. This claim was based on *Southern Railway Co.* v. *Greene*,[93] which held that a railroad company which had acquired a substantial amount of property of a permanent character within the state had become a "person within the jurisdiction" of the state, and so could not be discriminated against in favor of domestic corporations conducting the same kind of

[90] 218 Mass. 558, 575–76, 106 N. E. 310 (1914).
[91] 218 Mass. 558, 577, 106 N. E. 310 (1914).
[92] 218 Mass. 558, 579, 106 N. E. 310 (1914).
[93] 216 U. S. 400, 30 Sup. Ct. Rep. 287 (1910).

business. The claim of the White Company is dismissed on the ground that its property is of a kind readily salable for other uses, and is not like railroad property which cannot be advantageously disposed of if the business is abandoned. This seems a sound distinction between the property involved in the principal case and that owned by the Southern Railway Company. But a simpler ground for dismissing complainant's contention would be that the Southern Railway Case involved discrimination between foreign and domestic corporations, and not merely an increase in taxation. The Supreme Court decisions warrant no doctrine that the equal-protection clause prevents a state from increasing its taxation on foreign corporations, provided it does not in so doing discriminate in favor of domestic corporations. The foundation for such claims, when any exists, is the obligation of contracts clause,[94] or the due-process clause as interpreted and applied in the concurring opinion of Mr. Justice White in the Western Union Case,[95] and later adduced by him in the Looney Case.[96]

## III

In none of the foregoing cases have the foreign corporations been engaged in manufacturing within the state. Their branches within the state were for the purpose of disposing of products made in other states. Such part of their business as was intra-state in character consisted of sales within the state of property previously introduced. In *International Paper Co.* v. *Commonwealth*,[97] however, the Massachusetts court had to deal with the rights of a foreign corporation engaged in manufacturing within the state. It did not appear what proportion of the product manufactured in Massachusetts was sold to purchasers in that state; but, of all sales to purchasers within the state, only fourteen per cent were from a Massachusetts mill. The remaining eighty-six per cent of sales to Massachusetts purchasers involved transportation from mills in other states. Of its twenty-three mills, only one appeared to be located within the state. Less than two per cent of its total assets of something over $40,000,000 were in Massachusetts.

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94 American Smelting & Refining Co. *v.* Colorado, 204 U. S. 103, 27 Sup. Ct. Rep. 198 (1907).

95 See 31 HARV. L. REV. 586–87.

96 See 31 HARV. L. REV. 603, 613.

97 228 Mass. 101, 117 N. E. 246 (1917).

The tax to which the plaintiff objected was computed by taking one one-hundredth of its total authorized capital stock in excess of $10,000,000, with no maximum limit. Relying on the cases which hold that manufacture is not commerce,[98] the court declared that permission to conduct such business might have been entirely withheld from a foreign corporation. It is plainly implied that the state is free to measure its excise on such a foreign corporation by any method it desires. Chief Justice Rugg quoted from *Pullman Co.* v. *Adams* [99] the statement that the "company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce,"[100] and added that "this is true even though the re-

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[98] United States *v.* E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. Rep. 249 (1895); Kidd *v.* Pearson, 128 U. S. 1, 20, 21, 22, 9 Sup. Ct. Rep. 6 (1888); Cornell *v.* Coyne, 192 U. S. 418, 428–29, 24 Sup. Ct. Rep. 383 (1904); Hopkins *v.* United States, 171 U. S. 578, 594, 19 Sup. Ct. Rep. 40 (1898); Keystone Watch Co. *v.* Commonwealth, 212 Mass. 50, 98 N. E. 1063 (1912).

The Keystone Case was decided by the Massachusetts court before the Supreme Court decided the Baltic Case. It applied to a Pennsylvania corporation manufacturing watches in Massachusetts, the statute upheld in the Baltic Case. The opinion reiterated the previous interpretation put upon the statute to the effect that it did not apply to foreign corporations "engaged in conducting some kind of interstate commerce for hire as its principal function with which intra-state business is so closely connected that it cannot be given up without serious detriment to the interstate commerce," giving as an illustration the "telephone or telegraph business." The ocrporation had a manufacturing plant in Massachusetts worth $1,300,000, at which it employed about three hundred and seventy-five persons. Not more than two per cent of the output of this plant was sold to Massachusetts purchasers. Over ninety-five per cent was sold on orders solicited and accepted outside of Massachusetts. The court said that it was obvious "that the activities of the petitioner conducted within this Commonwealth are chiefly those of manufacture, and not of commerce." Continuing, the opinion observed:

"The maintenance of the petitioner's plant in Massachusetts is for a distinct department of its manufacture. Although manufacture contemplates commerce, that is a subsequent stage. Its manufacturing business is entirely separable from the commerce which follows and which is involved in the sale of the product. The petitioner, by reason of its several factories located in different states, does not thereby conduct a business so unified and interwoven as to be in a position similar to a telegraph or telephone company. Its factory here is separable in valuation as appears by the statement of facts. It is not a necessity for its interstate commerce nor necessarily maintained for use in connection with interstate commerce."

For a criticism of this way of looking at the relation between manufacture and commerce, see pages 747–756, *infra*. For Supreme Court decisions which qualify the Knight and Hopkins cases, *supra*, see Swift & Co. *v.* United States, 196 U. S. 375, 25 Sup. Ct. Rep. 276 (1905), and United States *v.* Reading Co., 226 U. S. 324, 33 Sup. Ct. Rep. 90 (1912).

[99] Note 3, *supra*.

[100] 228 Mass. 101, 115, 117 N. E. 246, 251 (1917). Quoted from 189 U. S. 420, 422.

ceipts from the local business do not equal the expenses chargeable against such receipts." [101] His reliance on *Pullman Co.* v. *Adams* [102] and *Allen* v. *Pullman Co.*[103] seems to indicate his conviction that the doctrine of those cases was unaffected by the Western Union Case.[104] Any such position is open to grave doubts. Certainly some foreign corporations engaged in domestic and interstate commerce within the state may complain of some taxes on the domestic business, though they are legally free to renounce that business. The language of the opinions in the Western Union Case, and of succeeding opinions expressing approval of that case, should have convinced the Massachusetts court that any foreign corporation may successfully object to any tax on its domestic business which substantially burdens its interstate business. It might have assumed that the Supreme Court would ascertain whether any tax on domestic business burdens interstate commerce by estimating the effect on interstate commerce of abandoning the domestic business. It may well be that the precedents in effect when the International Paper Case [105] was decided would not preclude this Massachusetts tax on this corporation. But this is not to say that the tax was valid by reason of the doctrine of *Pullman Co.* v. *Adams* [106] and *Allen* v. *Pullman Co.*,[107] for that doctrine had certainly been discountenanced by the doctrine of the Western Union Case.

The International Paper Case [108] raises the interesting question whether the state has more power over a foreign corporation engaged in manufacturing within the state than over one engaged in intrastate sales. It is true that manufacture is not legally commerce,[109] and that therefore it is not interstate commerce. But a foreign corporation may combine the business of manufacturing and interstate commerce, as it may combine domestic and interstate commerce. The abandonment of manufacturing may burden interstate commerce more than would the abandonment of a domestic business which is technically commerce. The state has no more power over the domestic manufacturing of foreign corporations than it has over their domestic sales or transportation. If its plenitude of power over the taxation of the exercise of corporate functions in the

[101] 228 Mass. 101, 115, 117 N. E. 246, 251 (1917).

[102] Note 3, *supra*.

[103] Note 3, *supra*.

[104] Note 4, *supra*.

[105] Note 97, *supra*.

[106] Note 3, *supra*.

[107] *Ibid.*

[108] Note 97, *supra*.

[109] Cases cited in note 98, *supra*.

business of domestic sales and transportation does not permit it to encroach by indirection on interstate commerce, why should it be given greater latitude in the taxation of the exercise of those corporate functions in the business of manufacturing? The question in every case should be whether the abandonment of the functions upon which rests the power to tax would actually burden the functions which are immune from state interference.

It is plain that the abandonment of domestic sales does not burden the business of making interstate sales to any such degree as the abandonment of domestic transportation burdens the interstate transportation. We did not know until December 10, 1917, when *Looney* v. *Crane Co.*[110] was decided, whether the Supreme Court would regard any tax on foreign corporations making local sales within the state as an interference with their interstate business. Until that decision the Baltic Case [111] was the only one that touched the question; and, in that case, the tax, though measured by total capital stock, was limited in amount. It might have been supposed that the limitation in amount would have been regarded as unnecessary, in view of the comparatively slight economic integration of domestic and of interstate exchange. But, now that the reverse turns out to be the judgment of the Supreme Court, it is not to be expected that a different attitude will be taken towards taxation of foreign corporations engaged in manufacturing within the state, merely because manufacturing is not legally commerce. True, the opinion in the Looney Case [112] may seem to mark the recrudescence of the test of artificial legal distinctions and the abandonment of the intervening test of practical results. If this were so, the Supreme Court might make use of the legal distinction between manufacturing and commerce to impute to the state, arbitrary power over foreign corporations engaged in manufacture within its borders. But the more optimistic view to take of the Looney Case is that the Supreme Court had become convinced that it was wiser to discountenance the unqualified use of the measure of total capital stock in excises on foreign corporations engaged partly in interstate commerce, and to emphasize its aversion by language so strong that state courts would know that it would require the weightiest of practical considerations to overcome the presumption of illegitimacy which such a measure creates. Under this interpretation,

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[110] Note 13, *supra*. [111] Note 8, *supra*. [112] Note 13, *supra*.

practical considerations still control the decisions of the Supreme Court on the question under discussion. But now the practical considerations are not necessary to create the presumption of illegitimacy. The presumption stands unless it can be shown from the circumstances of the particular case that the apprehended interference with interstate commerce will not materialize. If this analysis of the attitude of the Supreme Court is well founded, it is not likely that the legal affinity or remoteness of commerce and manufacturing would influence the Supreme Court in deciding whether it would look more favorably on the Massachusetts tax on the International Paper Company than on the Texas tax on the Crane Company. To save the former from the excommunication visited on the latter, it would be necessary to show that there was substantially less economic integration between the various activities of the International Paper Company than between those of the Crane Company.

Just what view the Massachusetts court takes of this question is not wholly clear. Chief Justice Rugg says that the "local manufacture of paper is disconnected with the interstate business of the petitioner except as an artificial relation has been established by the petitioner," [113] and that they "have no inherent connection one with the other." [114] This might be taken to mean that the two kinds of business could be divorced from each other without serious loss to the interstate business. But against the inference that this is what the Chief Justice has in mind is the fact that he cites cases holding that Congress cannot control manufacture,[115] and that the states are not precluded from controlling it because of the intention of the manufacturer to put his product into the channels of interstate commerce.[116]

From a business standpoint there is certainly nothing "artificial" in combining the business of manufacturing with that of the sale of the product in interstate trade. The lack of any "inherent connection" between the two would not be apparent to a man of affairs unversed in legal niceties. Nothing is more natural than that a corporation which manufactures paper should also sell it. It is natural that many consumers will dwell in other states than the one

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[113] 228 Mass. 101, 112, 117 N. E. 246, 250 (1917). [114] *Ibid.*

[115] The Knight Case and the Hopkins Case, cited in note 98, *supra*.

[116] Cornell *v.* Coyne, note 98, *supra;* Kidd *v.* Pearson, note 98, *supra*.

in which the manufacture takes place. It is natural that the location of the mills should be influenced by the place where raw materials and motive power are best available. And the donor of the sources of pulp and power was not particularly mindful of state lines. The mills will seek the waterfalls. Yet under the Massachusetts doctrine the mills outside the state will increase the tax on the exercise of corporate functions within the state. If the tax is too great for the domestic manufacturing to bear, the corporation may leave the state and supply Massachusetts purchasers from its mills in other states.

It may be urged that this withdrawal from local manufacturing would impose no burden on interstate commerce. But suppose other states follow the lead of Massachusetts and impose on the exercise of corporate functions within their borders similar excessive burdens which make the corporation desist from manufacturing. How then will it supply its Massachusetts customers? The combined effect of such statutes in different states would impose serious burdens on interstate commerce. It would forbid unity of ownership and management of mills in different states. It might require that mills be less advantageously located. It would increase costs of production, by complicating the purchase of raw materials and their distribution among the mills in different states. If the state's taxing power over domestic manufacturing is unlimited, the states together may compel consumers to seek their supplies from foreign countries. It is difficult to believe that the Supreme Court would ever sustain state taxes on foreign corporations engaged in manufacturing within their borders and in other states and selling a large portion of the combined product in interstate trade, if such taxes actually resulted in substantial burdens on interstate commerce in the manufactured product.

At first glance *Kidd* v. *Pearson* [117] might seem authority for the proposition that no burden on manufacturing could by any possibility be a regulation of interstate commerce. That case allowed a state to forbid the manufacture of liquor even though the liquor was intended to be shipped out of the state. It is thus declared that a state may through its police power crush a necessary antecedent to interstate commerce. But this was before the Western Union Case.[118] A different view was taken in *West* v. *Kansas Natural Gas*

[117] Note 98, *supra*.

[118] Note 4, *supra*.

*Co.*[119] with regard to the attempt of Oklahoma to prevent the exportation of natural gas from the state. The power of the state over its highways and over the right of eminent domain was adduced in support of the statute, but Mr. Justice McKenna quoted with approval a statement from the Circuit Court of Appeals of the eighth circuit to the effect that "no state can by action or inaction, prevent, unreasonably burden, discriminate against, or directly regulate, interstate commerce or the right to carry it on." [120] Mr. Justice Holmes was among those who dissented, thus suggesting that the division of opinion related to the question whether the state could use its conceded powers to accomplish by indirection what it could not do directly. The logic of the Western Union Case clearly restrains state burdens on any kind of intra-state business which in plain fact amount to substantial regulations of interstate commerce. The legal separability of the subject taxed and the subject with reference to which the amount of the tax is determined is no longer controlling. The Western Union Case shifted the issue to one with respect to the facts as to the substantiality of the burden on the subject which is immune from the power of the state.

Viewing the situation as it was when the Massachusetts court decided the International Paper Case,[121] it is to be remembered that the United States Supreme Court had declared that it would look through form to substance and would judge each case according to its own facts. It might therefore have been anticipated that the Supreme Court would in each case regard the actual burden imposed by the tax in question on the interstate commerce in question. This would require it to take account of the rate of levy as well as of the measure to which that rate is applied. It was not, however, declared that this would be done. It was settled that the measure of total capital stock was proper for taxes on the franchises of domestic corporations, but improper for taxes on foreign corporations engaged in transportation. The law with respect to other foreign corporations was uncertain. It was clear that a reasonable maximum would cure the evil lurking in the measure of total capital stock, but the Supreme Court had yet to pass judgment on the use of such a measure with no limitation to the annual imposi-

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[119] 221 U. S. 229, 31 Sup. Ct. Rep. 564 (1911).

[120] 221 U. S. 229, 262, 31 Sup. Ct. Rep. 564 (1911).

[121] Note 97, *supra*.

tion. The Massachusetts supreme court, however, took the position that the absence of a maximum is immaterial, at least in excises on foreign corporations engaged in local manufacturing. It declares specifically that, under the doctrine of *Pullman Co.* v. *Adams*,[122] it is not open to the International Paper Company to urge "that the excise is 'unduly great having reference to the real value' of the property of the petitioner within this Commonwealth, or to the amount of domestic business transacted here." [123] Another reason given why the contention was not open in the particular case is that the record does not show the amount of the domestic business conducted within the Commonwealth or the real value of the property located therein. But Chief Justice Rugg adds that, even "if it be assumed that that question is open to the petitioner and that it must be decided on this record, it cannot be said that the excise is excessive." [124] The tax of $5,500 sustained in the case is said to be less than twice the annual exaction for certain classes of liquor licenses. The petitioner is said to have "extraordinarily large financial resources." And the justification for basing the amount of the tax on property, ninety-eight per cent of which is without the state, is thus expressed:

> "It cannot be presumed that it may not be worth more to such a large corporation than it would be to a small one to be permitted to go into the local markets and compete for local business as a domestic manufacturer." [125]

Doubtless this is correct. But can it be presumed that it is worth fifty times as much for this corporation to manufacture paper within the state as it would be if it manufactured paper only within the state? Chief Justice Rugg continues:

> "We know of no principle of law which requires the conclusion that a license fee of that amount is unduly or unreasonably great to a corporation of such large capital as the petitioner, for the privilege of admission to the local markets of this Commonwealth for the transaction of an intrastate business in the manufacture and sale of an undisclosed quantity of paper of undisclosed value and out of which an undisclosed profit is realized." [126]

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[122] Note 3, *supra*. [123] 228 Mass. 101, 115, 117 N. E. 246, 251 (1917).
[124] 228 Mass. 101, 116, 117 N. E. 246, 251 (1917).
[125] 228 Mass. 101, 116, 117 N. E. 246, 252 (1917). [126] *Ibid.*

This may be true enough, so far as a specific tax of $5,500 is concerned. Before the Looney Case [127] it might have been supposed to be true also with respect to a tax measured by total capital stock in excess of $10,000,000 where the rate of levy is only one one-hundredth of one per cent. But if the rate were to be raised to five per cent or ten per cent — as, under the doctrine of the Massachusetts court, it might be — the practical question would be entirely different, and, it is submitted, the legal one should be also.

The Supreme Court had declared that every tax is to be judged by its actual effect on interstate commerce and had intimated that this effect is to be determined with reference to the results of paying the tax or of abandoning intra-state business to avoid such payment. To tax a foreign corporation engaged in domestic manufacturing, $150,000 or $300,000 a year because it has a lot of mills outside the state, where under the same statute it would be taxed nothing if it had no mill except one or more in the state worth less than $10,000,000, would certainly burden the method of doing business which combines manufacturing in various states with sales among the several states. It is not unworthy of notice that this section of the Massachusetts statute, which applies only to corporations whose capital stock exceeds $10,000,000, seems designed for the express purpose of reaching corporations with manufacturing plants in several states, since many, if not most, of the corporations having manufacturing plants only within the state will have a capital of less than $10,000,000.

The Massachusetts court had every reason to assume that the Supreme Court had thoroughly accepted and digested the realistic attitude which it announced in *Western Union Telegraph Co.* v. *Kansas* [128] and the later cases [129] which were distinguished from that, and that therefore the Supreme Court would disallow a tax under this Massachusetts statute if the rate were increased to five or ten per cent. Before the Looney Case, the Massachusetts court might have expected that its decision in the International Paper Case would have been sustained by the Supreme Court, but it had ample warning that any decision sustaining the tax would have been put on more restricted grounds than those announced in the opinion of Chief Justice Rugg. Now that the opinion of Chief Justice White

[127] Note 13, *supra*.

[128] Note 4, *supra*.

[129] Cases cited in notes 8 and 15, *supra*.

in the Looney Case makes a general principle out of what had previously been merely a guide for forming a practical judgment in each specific case, it is not to be expected that the single fact that the complaining corporation manufactures as well as sells within the state will be regarded by the Supreme Court as sufficient to exclude the International Paper Case from the doctrine of the Looney Case. There is good reason to believe that the Supreme Court will insist that a reasonable maximum is a necessary ingredient in any statute making any reference to total capital stock in prescribing the amount of an excise on foreign corporations engaged partly in interstate commerce.

The Massachusetts court, however, was not alone in sustaining a tax on a foreign corporation engaged in domestic manufacturing, where the measure adopted was the total capital stock with no provision for a maximum. The supreme court of Tennessee in *Atlas Powder Co.* v. *Goodloe* [130] relied on the Baltic Case to support such a tax, without adverting in the opinion to the significance of the absence of any provision for a maximum in the Tennessee statute. The amount imposed was $1,500 on an authorized capital stock of $5,000,000. The Tennessee assets were $305,945.11, and the assets in other states were $6,000,000. There was manufacturing in Tennessee and in other states, sales in car-load lots from other states to Tennessee, and also sales from Tennessee to other states. Just what weight the court gives to the fact that there was domestic manufacturing is not clear. It is pointed out that neither of the two corporations complaining in the Baltic Case "owned a factory in Massachusetts, but each had a local warehouse where local sales were made." [131] The situation before the Tennessee court is referred to as follows:

"One important feature in the case at bar is that it [*sic*] is engaged in manufacturing black gunpowder at its factory at Ooltewah, in this State, and it also has six storage magazines where explosives are kept. It also has its places in this State in a number of cities where local sales are made. It occurs to us that any part of this local business is of such character as to render the complainant liable to the payment of this charter tax, or tax on its right to enter the State to do intra-state business. Certainly

[130] 131 Tenn. 490, 175 S. W. 547 (1915).
[131] 131 Tenn. 490, 516, 175 S. W. 547 (1915).

the manufacturing business in this State and the operation of storage magazines are so far separated from the interstate sales of explosives that there can be but little difficulty in the conclusion that the right of the state to impose this tax is clear, and we so hold." [132]

This does not definitely declare that local manufacturing is more remote from interstate commerce than are local sales, yet it permits the inference that the Tennessee court had some such distinction in mind. On the other hand, earlier in the opinion, it was said that the complainants in both the Baltic Case and the principal case "could have omitted the local business if they saw proper, and thus separated the local business from the interstate commerce." [133] By contradistinction the Pullman Company and Western Union Telegraph Company were said to be "public service corporations" which "were bound to accept local business." [134] If this means that the doctrine of the Western Union Case is based on the fact that the complainant was under a legal duty not to abandon intra-state commerce, it is obviously incorrect. It is, moreover, inconsistent with the implication of an earlier statement of the Tennessee court to the effect that it was claimed on behalf of the companies involved in the Western Union and Pullman cases "that their business and facilities for doing business were so intermixed that a tax upon the company was necessarily a burden upon interstate business, and it was so held by a majority of the court." [135] This and other statements in the opinion make clear that the Tennessee court appreciated that it was on the ground of the economic, and not the legal, inseparability of local and interstate business that the Western Union Case was decided.

While both the Massachusetts court and the Tennessee court attach importance to the fact that the corporations whose plaints they rejected were engaged in manufacturing within the taxing state, the opinions give reason to infer that both courts might have reached the same decision had the local business been wholly mercantile. To the extent that they assumed that this was established by the decision of the Supreme Court in the Baltic Case,[136] they were in error. The Baltic Case left the question an open one, and the opinion, taken as a whole, contained nothing inconsistent with

[132] 131 Tenn. 490, 516–17, 175 S. W. 547 (1915).

[133] 131 Tenn. 490, 516, 175 S. W. 547 (1915).

[134] *Ibid.*

[135] 131 Tenn. 490, 510, 175 S. W. 547 (1915).

[136] Note 8, *supra.*

the subsequent decision in the Looney Case. The Looney Case,[137] of course, will require the reversal of the Massachusetts and Tennessee decisions, unless the Supreme Court should regard the distinction between manufacture and sales as sufficient to exclude these state decisions from the "controlling principle" announced in the opinion in the Looney Case.

A somewhat different phase of the problem is presented by *General Ry. Signal Co.* v. *Commonwealth*,[138] decided by the supreme court of appeals of Virginia on January 13, 1916. This case involved the power of the state over a foreign corporation engaged in performing a contract within the state which involved equipping a railroad with safety devices. It appears that the corporation in question based its complaint before the state corporation commission wholly on the ground that it was engaged entirely in interstate commerce, and was therefore beyond the taxing power of the state. The commission decided this point against the corporation, on the authority of *Browning* v. *Waycross*,[139] which sustained a municipal license tax of $25 on agents or dealers "engaged in putting up or erecting lightning rods within the corporate limits." The Virginia court of appeals adopts the opinion of the state corporation commission on this point. In this it was clearly correct. Plainly the Signal Company did some business within the state which was not interstate commerce, and therefore it was not wholly immune from the taxing power of the state. As Chief Justice White observed in the Lightning Rod Case,[140] the construction work done within the state "involved no question of the delivery of property shipped in interstate commerce, or of the right to complete an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated." [141] Whether the Chief Justice was wholly warranted in an earlier statement that "such business was wholly separate from interstate commerce" [142] is perhaps another question. The answer to it has some bearing on the measure which the state may adopt for determining the amount of its tax on this local business.

[137] Note 13, *supra*.

[138] 118 Va. 301, 87 S. E. 598 (1916).

[139] 233 U. S. 16, 34 Sup. Ct. Rep. 578 (1914).

[140] Note 139, *supra*.

[141] 233 U. S. 16, 22–23, 34 Sup. Ct. Rep. 578 (1914).

[142] 233 U. S. 16, 22, 34 Sup. Ct. Rep. 578 (1914).

This question was raised when the Signal Company appealed from the corporation commission to the state court, and insisted that, even if it were subject to taxation because engaged partly in intra-state commerce, the state was nevertheless imposing an unconstitutional burden on interstate commerce by basing the amount of the imposition on the total capital stock. The opinion of the Virginia court on this point is as follows:

"In support of this contention, which we think is without merit, the appellant relies upon cases involving the right of the state to impose a license tax upon public service corporations engaged in both interstate and intra-state commerce within the state, which announce the well-settled doctrine that a state cannot lay a tax upon interstate commerce in any form.

"These cases have no application to the present case. Here the defendant is a commercial corporation carrying on a purely local and domestic business quite separate from their [*sic*] interstate commerce transactions. Under such circumstances the state has the right to prescribe the conditions upon which such a corporation may do its intra-state business, provided it lays no burden upon its interstate business. This question is disposed of by the case of *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127, which holds that:

"'Where a foreign corporation carries on a purely local business separate from its interstate business, the state may impose an excise tax upon it for the privilege of carrying on such business and measure the same by the authorized capital of the corporation.'

"There is no error in the order appealed from, and it is affirmed." [143]

Thus the Virginia court disregards the fact in the Baltic Mining Case that the annual imposition under the Massachusetts statute could not exceed $2,000. The statement by the Virginia court of the holding in the Baltic Case is a quotation from the headnote in the official edition of the Supreme Court reports. That headnote, however, was unwarranted by the opinion of the Supreme Court, since it was specifically pointed out that all the facts in the case were material, and one of the facts was the $2,000 maximum. Whether the Supreme Court would uphold the Virginia court in sustaining the tax on the Signal Company should depend on the judgment it would pass on the degree of interrelation between the construction done by the corporation in Virginia and the interstate shipment to Virginia of the materials there to be affixed.

[143] 118 Va. 301, 312–13, 87 S. E. 598 (1916).

It is evident that, if Virginia is permitted to measure its tax by total capital stock, foreign corporations with large capital will be discriminated against in favor of their foreign and domestic competitors whose capital is less. The Virginia method of measurement might in many instances enable local concerns to underbid their larger rivals in other states. If the performance of the contract involved no interstate commerce, this favoritism would be impeccant, if *Horn Silver Mining Co.* v. *New York* [144] is still law. But where the materials to be affixed within the state would be brought by foreign contractors from without the state, the Horn Case would not be controlling. The case would then be within the "general principle" announced in the Looney Case. The legal separability of the activity taxed from the interstate commerce instrumental thereto would seem to afford no sensible ground for permitting an exaction which, "intrinsically and inherently considered," is beyond the power of the state.

No exception can be taken to the statement of the Virginia court, above quoted, that, if the local business is quite separate and distinct from the interstate commerce transactions, "the state has the right to prescribe the conditions upon which such a corporation may do its intra-state business, provided it lays no burden upon its interstate business." The "if" and the "provided" safeguard the statement from attack. But the application of the statement to each particular case requires consideration of the degree of economic separation between the local and the interstate business, and of the question whether the tax does lay a burden on interstate commerce.

Very likely the tax in the particular case was not unduly burdensome on interstate commerce. The authorized capital of the Signal Company was $5,000,000, and the tax was $1,000. The contracts which it was performing in Virginia called for the payment of $214,040. It is not to be supposed that a foreign corporation would be deterred from seeking a $200,000 contract by the imposition of a tax which is only one-half of one per cent of its gross return. But if the work to be done called for the payment of only $5,000 or $10,000, it is not likely that a foreign corporation with $5,000,000 of authorized capital would submit a bid. The Virginia statute bars large foreign corporations from making small contracts to be per-

[144] 143 U. S. 305, 12 Sup. Ct. Rep. 403 (1892). See 31 HARV. L. REV. 613.

formed within the state. To the extent to which such corporations would perform those contracts by shipping materials in interstate commerce, the loss thereof prevents interstate commerce from taking place.

It may readily be perceived that it would be unduly vexatious, both to litigants and to the Supreme Court, to take to that high tribunal every dispute which might arise under the Virginia statute. The confusion and uncertainty which would arise if each case depended on its own facts is only too apparent. Such considerations doubtless influenced the writer of the Looney opinion in adducing "general principles" in support of the decision, rather than deciding the particular case on its particular facts. The possibility of evil with which the Virginia statute is pregnant seems sufficient to warrant the establishment of a general rule that an unbridled measure of total capital stock is vicious in all cases where it is applied to a foreign corporation which to an appreciable degree combines interstate commerce with its other activities within the state. In many instances the evil would not be averted by limiting the tax to $2,000 or to $1,000.

To a considerable extent analogous evils are possible in similar taxes on foreign corporations whose construction work within the state might be wholly unrelated to any interstate transportation. Foreign corporations of any considerable magnitude would have to be assured of a fairly large volume of business within the state before they could wisely make a contract for work therein. Excises on foreign corporations, measured, not by the amount of work done within the state, but by the wealth of the corporation doing it, must in plain fact tend to elevate state lines into hurdles to impede the course of interstate business. The Supreme Court's reference to the due-process clause, in addition to the commerce clause, in the Western Union and Looney cases, may well be an entering wedge to the overruling of *Horn Silver Mining Co.* v. *New York* [145] and to the declaration that the local business of foreign corporations, whether connected with interstate business or not, must be taxed according to the amount of the business, and not according to the resources of the corporation doing it.

Wherever a state bases the amount of its tax on values which lie beyond its borders, it is emulating the example of the hard man

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[145] Note 144, *supra*.

of the parable, and seeking to reap where it sowed not, and gather where it has not strawed. Its constitutional right to do this was long ago sanctioned by the declaration of Chief Justice Marshall that the power to tax involves the power to destroy. It has taken Marshall's successors near a hundred years to break the spell of his apothegm. But now that this has been accomplished, the way is open to face anew the problem of the limits of state taxation, and to abandon artificial criteria in favor of distinctions that hug the facts. This has been done in passing judgment on taxes on foreign corporations engaged partly in interstate commerce. And it has been strongly hinted that similar results will be reached under the due-process clause, and that therefore foreign corporations engaged solely in intra-state business will be relieved from taxes which are disproportionate to the business taxed. The conditions under which business is done by foreign corporations today are substantially different from those of the period when sanction was first given to the doctrine that the state has unlimited taxing power over foreign corporations not engaged in interstate commerce. The nation-wide organization of industry and commerce, and the enormous capital of the corporations whose business spans the continent, make the measure of total capital stock a most inequitable one for each state in which some fraction of that business is done. The actual menace may not be great, since large corporations may, by creating subsidiaries for operation in each of the several states, see to it that existing laws do not multiply exactions on the same economic interest. But this way of escape gives further evidence of the ineptitude of the measure of total capital stock for taxes on foreign corporations. It would be a sensible doctrine that the states must measure their taxes by property or business which they protect, and not by wealth which has its *situs* elsewhere. There is indeed more reason to restrain a state from taking toll from property or business within the boundaries of its neighbors, than to forbid it to reap a benefit from the interstate commerce which takes place within the area where its authority obtains.

## IV

In all of the cases thus far considered, the excise taxes on foreign corporations have been measured by some or all of their capital

stock. But the West Virginia statute involved in *Baldwin Tool Works* v. *Blue*[146] measured the excise on foreign corporations by their total receipts within the state, including those from interstate, as well as from intra-state, commerce. From a reference to the bill, it appeared that the case involved several corporations, but the opinion does not give their names or the kind of business in which they were engaged, with the exception of one domestic corporation which was a holding company. It is evident from other language in the opinion that some of the other corporations were foreign to West Virginia. It is evident too that some of these foreign corporations were engaged in business in other states as well as in West Virginia, for the court states and rejects a contention made with reference to the provision in the statute for ascertaining the annual income of such corporations which shall be deemed to have been earned within the state. The material provisions of the statute are as follows:

"Every corporation . . . now or hereafter organized under the laws of this state, or under the laws of any other state or government and engaged in any business whatsoever in the state of West Virginia, shall pay an annual special excise tax for the privilege of carrying on or doing business in the state of West Virginia, equivalent to one-half of one per centum upon the entire net income of such company, received by it from all sources during the year, on business transacted and capital invested in this state, as hereinafter set forth. . . .[147]

"It is the intention of this chapter to assess the tax imposed thereby on the net income as defined therein of the corporations . . . arising from business transacted and capital invested in this state. Every such company having capital invested in its business in this state only, shall pay the tax upon its entire net income ascertained as herein provided; and every such company, except an insurance company, engaged in business and having capital invested and transacting business both in and out of the state, shall pay the tax upon that part of its entire net income which bears the same proportion to its whole net income that the assessed value for purposes of taxation of its assets and property within the state bears to the total assessed value of all of its assets and property in the jurisdictions where it is located."[148]

The complainants objected to any reference to property in, or receipts from, other states in determining the receipts deemed to have been earned within the state. The court's answer is brief:

[146] 240 Fed. 202 (1916). [147] 240 Fed. 202, 204 (1916). [148] 240 Fed. 202, 204–05 (1916).

"A careful consideration of the provisions of the statute as respects this question leads us to the conclusion that the method employed for ascertaining the amount of the tax which the corporation is required to pay is perhaps as fair, as a general rule, as any scheme that could be devised for that purpose. Undoubtedly the state of West Virginia has the right to base its tax upon the return of the entire net income in the respective states, and to apportion the amount of the income thus ascertained as a means of ascertaining the net income subject to taxation by the state." [149]

The authorities cited do not support the proposition. The Baltic Case [150] did not involve any reference to receipts. *United States Express Co.* v. *Minnesota* [151] used receipts as an aid in valuing property and not in assessing an excise tax. *Maine* v. *Grand Trunk Railway Co.*,[152] it is true, involved an excise tax on a foreign corporation, but the court later reinterpreted it and placed it on the ground that the tax in question was in the nature of a property tax.[153] The cases permitting the valuation of property within a state to take account of receipts from interstate commerce will be dealt with in a succeeding section of this discussion. They rest on grounds which do not apply to excise or occupation taxes.

There is no doubt that a state tax directly on receipts from interstate commerce is invalid.[154] And a tax on railroads "equal to" a percentage of receipts has been held to be as vicious as a tax levied on receipts *eo nomine*.[155] It must therefore be open to serious question whether the Supreme Court will allow a state to include in the measure of a tax on the privilege of a foreign corporation to engage in domestic business, any receipts which are from interstate commerce.[156] It has been explicitly held that

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149 240 Fed. 202, 206 (1916).

150 Note 8, *supra*.

151 223 U. S. 335, 32 Sup. Ct. Rep. 328 (1912).

152 Note 3, *supra*.

153 Galveston, H. & S. A. Ry. Co. *v.* Texas, 210 U. S. 217, 226, 28 Sup. Ct. Rep. 638 (1908).

154 Philadelphia & Southern Mail S. S. Co. *v.* Pennsylvania, 122 U. S. 326, 7 Sup. Ct. Rep. 1118 (1887).

155 Galveston, H. & S. A. Ry. Co. *v.* Texas, note 153, *supra*.

156 In the Galveston Case, note 153, *supra*, Mr. Justice Holmes observed that the tax in question "is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'" This hint of the possibility of disguising the tax by calling it an "occupation tax" seems to have animated the Texas legislature to amend the statute and dub the tax an "occupation tax." There was enough in a name to persuade the court of civil

such a measure cannot be applied to a so-called "revenue tax" on a railroad corporation.[157] On the other hand in *Ficklen* v. *Shelby*

appeals of Texas to hold in State *v.* Houston Belt & Terminal Ry. Co. (Tex. App.), 166 S. W. 83 (1914), that the tax, being not on interstate receipts but on an occupation, and only measured by receipts, was not a regulation of interstate commerce. This case was criticized in a note in 28 HARV. L. REV. 93. It was reversed by the supreme court of Texas in Houston Belt & Terminal Ry. Co. *v.* State (Texas), 192 S. W. 1054 (1917). The Texas supreme court found that that tax could not be sustained as one on "going value" as property of the complainant, since "the assessment of its property for *ad valorem* taxation under the general laws included the value which it had as property of a going concern."

The law with regard to taxes on occupations is still unsettled. Ficklen *v.* Shelby County Taxing District, notes 85, *supra*, and 158, *infra*, has not yet been overruled, though the reasoning on which it was decided has been shaken by later opinions of the Supreme Court. In Commonwealth *v.* Crew Levick Co., 256 Pa. St. 508, 100 Atl. 952 (1917), it was held without discussion that a mercantile tax may be measured by the whole volume of business, including receipts from foreign commerce. The decision of the Pennsylvania court was reversed by the United States Supreme Court in Crew Levick Co. *v.* Commonwealth, 245 U. S. 292, 38 Sup. Ct. Rep. 126. The opinion of the court endeavored to distinguish the Ficklen Case, on the ground that the Pennsylvania tax in question was not "an occupation tax, except as it is imposed upon the very carrying on of the business of exporting merchandise." It was, however, stated that the Ficklen Case "is near the border line" and "has been deemed exceptional." The authority of the Ficklen Case is narrowly limited, if not directly shaken, by this latest decision on the subject, though this decision leaves it still possible for the Supreme Court to permit taxes on taxable occupations to be measured in part by receipts not themselves directly taxable. Yet on the whole the court's attitude towards the Ficklen Case seems to be that of *de mortuis nihil nisi bonum.* In Postal Telegraph Cable Co. *v.* City of Mobile, 179 Fed. 955 (1909), an injunction was granted against the enforcement of an ordinance imposing a flat fee of $1,000 on each telegraph company doing business in the city, while in Postal Telegraph Co. *v.* City of Portland, 228 Fed. 254 (1915), a tax of $75 per quarter for the privilege of doing local business in the city was sustained. The complainant alleged that the intra-state receipts did not equal the expenses properly chargeable to intra-state business, but the court answered that the question of the reasonableness of a tax was largely legislative in character. In Postal Telegraph Cable Co. of Norfolk *v.* Norfolk, 118 Va. 455, 87 S. E. 555 (1916), the Virginia court sustained a tax of $500 per year plus $1 per pole and $1 for every hundred feet of conduit. In State *v.* Northern Express Co., 76 Wash. 636, 136 Pac. 1160 (1913), however, a tax measured by gross receipts within the state including receipts from interstate commerce was held invalid. The chief reason given was that the company under the constitution of the state was not free to renounce its local business. For a different attitude towards such a provision in a state constitution, see Norhern Pacific Railway Co. *v.* Gifford, note 69, *supra.*

It is to be anticipated that before long the Supreme Court will be called upon to tell to what extent the doctrine of the Western Union Case applies to taxes on occupations and to declare whether or not Ficklen *v.* Shelby County Taxing District, *supra*, is still law. The problem is complicated by the fact that many municipal or-

[157] Meyer *v.* Wells Fargo & Co., 223 U. S. 298, 32 Sup. Ct. Rep. 218 (1912).

*County Taxing District*[158] it was held that commission dealers who desired to do a combined intra-state and interstate business could be required to pay a percentage of receipts from all kinds of business. If this case can still stand, it must be either (1) because the state has more power to take toll from interstate commerce through taxes on occupations than through taxes on corporate privileges, which is unthinkable, or (2) because of a controlling distinction between the character of the commission business and that of the transportation business. A commission merchant, unlike a railroad, may abandon intra-state business without serious results to the per-transaction costs of the interstate business. To a lesser degree the same is true of a foreign corporation engaged in local sales. If it gives up this business to escape burdensome taxation, it may reduce operating costs by curtailing office and warehouse expenses, and it may still furnish customers from stock in other states. But the abandonment of mining or manufacturing in the state will seriously affect the interstate business of the company.

It is worthy of note that in two of the cases following the Western Union Case[159] the Supreme Court has called attention to the practical distinction between excise taxes measured by property or capital stock and those measured by receipts.[160] When the tax

dinances impose specific taxes, or measure their exactions by the number of miles of wire or the number of poles within the municipal limits, though these facilities are used for interstate as well as for local commerce. It seems to be settled that the fact that the local business is unremunerative does not render it immune from taxation. Williams *v.* Talladega, 226 U. S. 404, 416–17, 33 Sup. Ct. Rep. 116 (1912). This case involved a specific tax of $100. The tax was held invalid because the ordinance made its payment a prerequisite to doing any business whatever, but the court declared that it would have been valid if imposed only on local business exclusive of that done for the federal government. It is also to be anticipated that specific taxes on occupations must either be negligible in amount, or must bear some reasonable relation to the value of the business subject to taxation. Some of these occupation taxes can doubtless be saved by being regarded as taxes on intangible property. In this case they may be measured in part by receipts from interstate commerce. Adams Express Co. *v.* Kentucky, note 166, *infra.*

158 Note 85, *supra.*

159 Note 4, *supra.*

160 St. Louis S. W. R. Co. *v.* Arkansas, 235 U. S. 350, 363–64, 35 Sup. Ct. Rep. 99 (1914): "The tax, as will be observed, is not in any wise based upon the receipts of the company from interstate commerce, either taken alone or in connection with the receipts from its intra-state business. Since, therefore, the amount of the imposition is not made to fluctuate with the volume or the value of the business done, we are

is measured by property or by capital stock, it is not increased by an increase in the volume of interstate commerce. When the tax is measured by receipts, it is increased by an increase in the volume of interstate commerce. The economic result of this increase of taxation dependent upon an increase of interstate commerce is to increase *pro tanto* the cost to the corporation of conducting interstate commerce. This is exactly the kind of burden which the states are forbidden to impose directly and which the Western Union Case forbids them to impose by indirection. The only practical difference between the direct and the indirect approach to the receipts would seem to be that, to block the indirect approach, it might be required to appear that the abandonment of the enterprise on which the tax is levied would materially injure the enterprises which afford the receipts by which the amount of the tax is in part determined.

From the aspect of the effect on interstate commerce of a withdrawal from local business in order to escape the tax on that business, mining and manufacturing are more closely akin to transportation than is the business of local sales. Interstate sales of West Virginia products must cease if West Virginia mills and mines close down. The abandonment of the domestic business would involve a serious diminution in the value of the property devoted to such business in the state, since its earning power is enhanced by the fact that the business of shipping across state lines is united with the business of mining and manufacturing. Much of the business of the country is most economically conducted by corporations which combine manufacturing with shipping across state lines. No state tax should be allowed which would require corporations, in order to escape from burdens on interstate commerce, to divorce the ownership and management of different kinds of business which cannot be practically or economically separated in fact.

The requirement of such separation, or the alternative of submission to a tax which is a burden on interstate commerce, cannot be regarded solely from the standpoint of the corporation which

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relieved from those difficulties that arise where state taxes are based upon the earnings of interstate carriers, . . ."

See also the passage quoted from Kansas City, F. S. & M. R. Co. *v.* Botkin, 240 U. S. 227, 335, 36 Sup. Ct. Rep. 261 (1916), in 31 HARV. L. REV. 598.

unites the business of interstate sales with that of manufacturing. It must be regarded also from the standpoint of the consumers in other states, since the effect of burdening the interstate commerce of the corporations would be to increase the cost to consumers. The combination of these different businesses may, it is true, give interstate corporations power for evil as well as for good. But the prevention of the evil is for Congress and not for the states. And if interstate corporations do not bear their fair share of the tax burden, this too is for Congress to remedy rather than for the states.

If the interests of the corporations were all that were in issue, West Virginia might urge with force some of the distinctions between mining and manufacturing on the one hand, and transportation on the other. As the transportation business is necessarily conducted, the same property is used for both interstate and domestic commerce, but the receipts can be attributed respectively to each kind of commerce. In the case of mining and manufacturing companies which ship their products across state lines, the property itself, with the exception of that part devoted to office purposes, is employed only for local business. Moreover, since all receipts come from sales, the company, by making no sales within the state, may so conduct its business that there are no receipts from local business, even though such business contributes mainly to the earnings. The state might therefore urge that the corporation, since it chooses to combine local business in such a way that no receipts are allocated to the local business, cannot complain that the only method of measuring an excise tax by receipts must necessarily include within the measure receipts from interstate commerce.

There would be great force in this contention, if the state, in losing the power to measure the excise by receipts, were debarred from any legitimate revenue. But the result of denying to the state the power to measure its excise tax on local business by reference to receipts is still to leave open to the state the adoption of a measure which regards as a basis the proportion of capital stock represented by property within the state,[161] or which regards the total capital stock, provided there is a satisfactory limit set

[161] St. Louis S. W. R. Co. *v.* Arkansas, note 160, *supra.*

to the maximum imposition.[162] And excises on corporations engaged in mining and manufacturing might also be measured by the actual value of the products extracted or created within the state. This power of the state was specifically sanctioned in *Missouri K. & T. Ry. Co.* v. *Meyer*.[163] The complaining interstate railroad in that case protested against an Oklahoma excise on persons or corporations engaged in mining within the state, on the ground that the coal mined by said railroad was not sold but was used by it for its locomotives engaged in interstate commerce. In dismissing the contention the court said:

"The coal produced from mines by the plaintiff first has its *situs*, and the production occurs, wholly within the state. If the tax should be regarded as levied upon property, it would not be objectionable on account of its use in interstate commerce. But if it was levied upon the production of the coal, it cannot be held invalid as a restraint or burden upon interstate commerce, because it attaches in advance of any use of the coal in such commerce, and it is too indirect in its effect thereon." [164]

Certainly the mining operations were taxable. The same is true of manufacturing operations within the state. If the state measures its exaction by the fruits of the mining or manufacturing, without seeking to tap the profits attributable to the commercial transactions of making sales for delivery in other states, no objections can be raised. But the state goes beyond this when it adopts the measure of total receipts. Though the books of a

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162 Baltic Mining Co. *v.* Massachusetts, note 8, *supra;* Lusk *v.* Botkin, note 15, *supra.*

163 204 Fed. 140 (1913).

164 204 Fed. 140, 144 (1913). Another point in the decision is interesting in view of the situation created by the recent assumption of federal control over the railroads. Some of the mines from which the coal was taken were owned by Indian tribes. The railroad leased the same, paying royalties for their use and conducting its operations under the supervision and direction of the Secretary of the Interior. Judge Cotteral observed that, "if this tax were an *ad valorem* tax upon the coal produced from the mines, it would be valid because the exemption adhering to it in the mines would terminate on its removal, upon the general principle that taxation of property is valid after the status which exempts it no longer exists." But the tax was said to be not upon property but upon the pursuit of mining. "If the tax be sustained," continued the court, "it seems clear it might be extended by legislation to the limit of depriving the leases of all value, and of frustrating the exercise of the federal power." The question to be settled was said to be "whether the tax is sufficiently direct in its bearing upon the leases to bring it into conflict with such agency." Without adducing specific argument, the court found the bearing of the tax on the federal agency to be sufficiently direct to require its collection to be enjoined.

corporation may not indicate what is made from mining or manufacturing, and what from the succeeding sales, the two stages are separable; and some estimate may be made of the proportion of the total returns to be allocated to the extractive or creative process. This estimate had to be made in *Missouri K. & T. Ry. Co.* v. *Meyer*,[165] where the producer was also the consumer. When a corporation unites the business of mining or manufacturing with that of making sales in other states, the activities without the state must usually enable it to get more for its product than what that product would bring if sold at the mill or mine. Unless some deduction is made from the receipts from sales to purchasers in other states, the state in which manufacture takes place is taking toll from interstate commerce.[166]

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[165] Note 163, *supra*.

[166] In considering whether taxes on franchises of foreign corporations may be measured in whole or in part by receipts from interstate commerce, a distinction must be drawn between a franchise to act as a corporation, and what is commonly termed a "special franchise" to occupy the public streets, which is possessed by corporations engaged in some form of transportation or communication. Such so-called special franchises are property. Owensboro *v.* Cumberland Teleph. & Teleg. Co., 230 U. S. 58, 33 Sup. Ct. Rep. 988 (1913); Boise Artesian H. & C. Water Co. *v.* Boise City, 230 U. S. 84, 33 Sup. Ct. Rep. 997 (1913). It would seem, therefore, that in assessing their value for purposes of taxation, account may be taken, under the doctrine of United States Express Co. *v.* Minnesota, 223 U. S. 335, 32 Sup. Ct. Rep. 211 (1912), of the total receipts to which their enjoyment gives rise, including receipts from interstate commerce. Such has been the decision of several state courts. Phillipsburg Horse Car R. Co. *v.* State Board of Assessors, 82 N. J. L. 49, 81 Atl. 1121 (1911); State *v.* Wells, Fargo & Co., 38 Nev. 505, 150 Pac. 836 (1915); Illinois Cent. R. Co. *v.* Mississippi Railroad Commission (D. C. S. D. Miss.) 229 Fed. 248 (1914), *semble;* People *v.* State Board of Tax Com'rs, 125 N. Y. Supp. 895 (1910); People *ex rel.* Commercial Cable Co. *v.* State Board of Tax Com'rs, 166 N. Y. Supp. 62 (1917); People *ex rel.* N. Y. C. & H. R. R. Co. *v.* Priest, 206 N. Y. 274, 99 N. E. 547 (1912), *semble.* These two last cases hold also that the propriety of determining the receipts deemed to be the product of the special franchise by taking a proportion of receipts earned in various states, depends on the facts in each case. See note 180, *infra.*

The validity of an assessment on these special franchises as property is conditioned of course on the fact that their value is not included in the assessment of other property taxes levied on the corporation. King County, Washington *v.* Northern Pacific Ry. Co., 196 Fed. 323 (1912). See also note 156, *supra.*

State statutes which by their terms seem to impose franchise taxes may be interpreted by the Supreme Court as levying, not "a true franchise tax," but "merely a property tax upon intangible property." Adams Express Co. *v.* Kentucky, 166 U. S. 171, 17 Sup. Ct. Rep. 527 (1897), discussed in Louisville & N. R. Co. *v.* Greene, 244 U. S. 522, 544–45, 37 Sup. Ct. Rep. 683 (1917). This last case, and also Illinois Central R. Co. *v.* Greene, 244 U. S. 555, 37 Sup. Ct. Rep. 697 (1917), consider interesting questions respecting the proper method of determining what proportion of the

The questions raised by the West Virginia statute are most inadequately dealt with in Judge Pritchard's opinion in *Baldwin Tool Works* v. *Blue*.[167] The point in issue was not whether it was "fair" to the corporation to pay a tax measured by its receipts, but whether such a tax was a regulation of interstate commerce. Many taxes which are fair enough, so far as the taxpayer is concerned, are regulations of interstate commerce, and are therefore to be imposed, if at all, by Congress rather than by the states. But there is strong ground to believe that the measure adopted by West Virginia for the tax on corporations doing business in several states was far from fair.

A foreign corporation doing business only in West Virginia could base its objection to the excise under consideration only on the commerce clause. But a corporation doing business in several states might have other grounds on which successful resistance might be placed. It might urge that within the doctrine of Mr. Justice White's opinion in the Western Union Case, West Virginia was in effect taxing property and business beyond the jurisdiction and thus denying it due process of law. It is to be noted that the West Virginia statute declares that "it is the intention of this chapter to assess the tax imposed thereby on the net income . . . arising from business transacted and capital invested in this state."[168] It thus disavows the intention to assess the tax on business not transacted in the state. But in the case of corporations doing business in several states, the statute bases the amount of the tax, not on the income from business actually done within the state, but on a proportion of the total income derived from business in all the states. This proportion is ascertained by applying to that total, the ratio between (1) the assessed value, for purposes of taxation, of the assets and property of the corporation within the state, and (2) the total assessed value of all its assets and property in all the states in which it does business.

The suitability of this ratio for determining what proportion of the receipts from business in all the states arises from business within West Virginia depends upon two assumptions: (1) that the

total intangible property of a railroad running through several states is to be regarded as located within the taxing state.

[167] Note 146, *supra*.

[168] 240 Fed. 202, 204 (1916). Quoted on page 761, *supra*.

assessed value for purposes of taxation in each state is the same proportion of the actual value of the property in that state; (2) that the earnings from business within each state bear the same ratio to the total earnings in all the states as the actual value of property within the state bears to the actual value of property in all the states.

In the case of certain corporations the first assumption will be found to be opposed to the facts. This is because in some other states the assessment values are not identical with the actual values. In some states, personal property employed in manufacturing is exempt from taxation. In Massachusetts, as Chief Justice Rugg points out in the International Paper Case,[169] a domestic corporation is not taxed locally for its personal property, but such property "is taken into account in ascertaining the value of its franchise upon which it pays an excise tax." [170] The result of such discrepancies between actual and assessed values in other states, while assessments in West Virginia correspond to actual values, is to allow West Virginia to extract additional revenue from the corporation because some other state, for the encouragement of manufacture, exempts certain property, or substitutes some other mode of taxation for *ad valorem* taxes on property.

The assumption that earnings in each state are proportioned to the value of property in that state is likewise unwarranted. This would not necessarily be true if all earnings were the result of the use of property. The property in West Virginia might be unproductive in any given year without reducing in that year its assessed value. An increase in the productivity of property in other states, without a corresponding increase in the productivity of property in West Virginia, would increase the amount of the tax in West Virginia. Since, if West Virginia were allowed to measure its taxation by a proportion of the total earnings in all the states, other states might *a fortiori* measure their taxes by the actual earnings in those states, the receipts taken as the measure of taxation in all the states might be greater than the total actual earnings.

A further vice in the assumption under consideration is that not all the earnings in all the states are the product of the use of property. The earnings from other states may be the fruit of

[169] Note 97, *supra*. [170] 228 Mass. 101, 114, 117 N. E. 246 (1917).

business unconnected with the use of property. That business may consist entirely of interstate sales. A leasehold interest and a clerical force may be all that is necessary to carry it on. The receipts from such business would be added to the total of which West Virginia fixes a proportion as the measure of its tax, but the absence of any considerable amount of property in states other than West Virginia would make the ratio between property in West Virginia and that in all the states a most inadequate one for the determination of what proportion of the total receipts shall be deemed to be earned from business in West Virginia.

It is clear, therefore, that the ratio applied by West Virginia to total receipts in all the states is little adapted to the professed end of ascertaining the receipts properly attributable to business in West Virginia. Its application to corporations doing business in several states, under the conditions suggested in the three foregoing paragraphs, would result in a more serious burden on interstate commerce than would the selection of the receipts actually derived from business in West Virginia. It would tax such corporations more severely than corporations doing business only in West Virginia, and would therefore penalize the interstate organization of business.

Unless the Supreme Court has abandoned its canon that every decision on the subject under consideration is to be based on the facts of the particular case, such facts in respect to the business and property and taxation of any foreign corporation as indicate that the West Virginia ratio does not serve its professed end, would be material in determining whether the tax was a regulation of interstate commerce or a taking of property without due process of law. And if the Supreme Court has discarded its realistic outlook, it has done so in favor of a rigid formula that any tax which would be invalid, if levied directly on what it is measured by, is invalid although levied on something else properly subject to taxation.

There are no authoritative precedents on the propriety of West Virginia's method of determining the receipts from business within the state for the purpose of measuring the amount of an excise tax, because the recent decisions [171] have denied to the states the power to measure excise taxes by receipts which include receipts

[171] Cases cited in notes 153 and 157, *supra*.

from interstate commerce. The only cases in which reference to receipts which include receipts from interstate commerce has been allowed in determining the amount of a tax imposed by the state, are those in which the state is seeking to value property within the state.[172] In those decisions we find that the court sustains the application of a ratio to a total only when the result may fairly be presumed to measure the actual value of that part of the total which is in the taxing state.

In *Fargo* v. *Hart*,[173] the state of Indiana sought to value the Indiana property of an interstate express company by taking that part of the total value of property in all the states which the mileage over which the company did business in Indiana bore to the total mileage over which the company did business in all the states. On the complaint of the company, the state was not allowed, in fixing the total to which the ratio was to be applied, to include assets of the express company not used in the express business, and which were therefore not properly distributable throughout all the states on a mileage basis. The inclusion of such assets in this total was held to be not merely a case of over-valuation, but an assessment made upon unconstitutional principles and a taxation of property beyond the jurisdiction of the state, and the imposition of an unconstitutional burden on commerce among the states. The following quotation from the opinion of the court shows the principle underlying the decision:

"It is obvious however that this notion of organic unity may be made a means of unlawfully taxing the privilege, or property outside the State, under the name of enhanced value or good will, if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value a division by mileage is justifiable. But it is recognized in the cases that if for instance a railroad company had terminals in one State equal in value to all the rest of the line through another, the latter State could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the State under a pretense. *Pittsburg, Cincinnati, Chicago & St. Louis Ry.* v. *Backus*, 154 U. S. 421, 431; *Western Union Telegraph Co.* v. *Taggart*, 163 U. S. 1, 23. The same principle applies to personal property which the State would not have the right

[172] United States Express Co. *v.* Minnesota, note 166, *supra*, and cases cited therein.

[173] 193 U. S. 490, 24 Sup. Ct. Rep. 498 (1904).

to tax directly. *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194, 227; S. C., 166 U. S. 185, 222, 223."[174]

The case of *Fargo* v. *Hart*[175] was quoted with approval in *Meyer* v. *Wells Fargo & Co.*[176] That decision involved an excise tax measured by a proportion of gross receipts. A corporation doing business in several states was required to pay a tax "equal to such proportion of said per centum of its gross receipts as the portion of its business done within the state bears to the whole of its business."[177] There was, however, in the statute a proviso for fixing a different proportion, if it "more fairly represents the proportion which the gross receipts of any such public service corporation for any year within this state bear to its total gross receipts."[178] This proviso was not before the court for consideration, because the reference to receipts was held entirely invalid; but, in considering the possible contention that the tax was to be regarded as a property tax, the court made the following comment:

"The plaintiff's receipts are largely from commerce among the States, and it also receives large sums as income from investments in bonds and land all outside the State of Oklahoma. So that it is evident that if the tax is what it calls itself it is bad on the former ground, and that whatever it is it is bad on the latter. *Fargo* v. *Hart*, 193 U. S. 490. In that case the tax was proportioned to mileage, and it was held that it could not be sustained when, although purporting to be a tax on property, it took into account, in order to increase proportionately the value of the mileage within the State, valuable property outside of it. The same principle would apply to a property tax measuring the total property by the total gross receipts increased by the special outside sources of income and taxing a proportion of this total fixed by the ratio of business within the State to that outside."[179]

In these two decisions the vice in the method of determining what part of the total property or business was within the state, lay in the selection of an excessive total rather than in the selection of an excessive ratio. Manifestly, however, an excessive ratio would have the same vice as an excessive total.[180]

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174 193 U. S. 490, 499–500, 24 Sup. Ct. Rep. 498 (1904).

175 Note 173, *supra*.

176 Note 157, *supra*.

177 223 U. S. 298, 299, 32 Sup. Ct. Rep. 328 (1912).

178 223 U. S. 298, 299–300, 32 Sup. Ct. Rep. 328 (1912).

179 223 U. S. 298, 300, 32 Sup. Ct. Rep. 328 (1912).

180 A number of cases hold that the taxpayer is not entitled to insist on the application of the mileage ratio to determine what proportion of its total earnings are to be

It may therefore be taken as established that the application of the unit rule for the purpose of determining what part of a total of taxable value in several states may be regarded as within the jurisdiction of the taxing state, is valid only where the relation of the ratio to the total is such that the result may fairly be presumed to represent the taxable value within the state. A complainant is entitled to a diminution of the total or of the ratio, upon proof that the total includes values not properly apportionable in all the states by the ratio selected, or upon proof that the ratio is not a proper method of apportioning the total.

Moreover, it is important to note that, in valuing property, the unit rule is legitimate only where the total property may properly be regarded as a unit. In the case of railroad and telegraph companies, the unit is a unit of physically connected property. In respect to the express business the unit has been declared to be one of "use and management." [181] This is the farthest that the

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taken as the measure of the value of a special franchise to use the highways of the state, when such special franchise is taxed as property. In People *ex rel.* N. Y. C. & H. R. R. Co. *v.* Priest, 206 N. Y. 274, 300, 99 N. E. 547 (1912), the New York court of appeals said:

"Any comparison of track or passenger mileage necessarily spreads the earnings over the mileage, without taking into account the value of a franchise at a particular place to increase the earnings of the system of road with which it is connected. A particular franchise is frequently of important value in connection with a railroad system as a means of obtaining and retaining business."

In People *ex rel.* Commercial Cable Co. *v.* State Board of Tax Com'rs, 166 N. Y. Supp. 62 (1917), the relator thought its franchise in the city of New York should be valued by applying to total earnings the ratio of the mileage in the city to the total mileage, including that of its trans-oceanic cables, but the court thought otherwise. In dismissing the contention, Judge Pendleton said:

"Where the mileage of the telegraph lines, within the city, is small as compared with the total mileage, but the terminal property in the city is the means of reaching the central point, from which business emanates and to which it converges, a comparison of the mileage of the special franchise with the total mileage cannot in the nature of things be an accurate basis for determining what proportion of the total net earnings should be allocated to the terminal property."

It is plain that in many cases a mileage ratio or a ratio of assessed value of property will be inept for determining what proportion of total receipts earned in several states shall be taken as the earnings within one of those states. The mileage or the property in one state may be more or less productive than the same amount of mileage or property in another state. It seems clear from the decisions, that neither the state nor the taxpayer can insist on some arbitrary ratio which can be shown to be in fact ill-adapted to the professed purpose in hand. See West Shore R. Co. *v.* State Board of Assessors, 82 N. J. L. 37, 81 Alt. 351 (1916).

[181] Adams Express Co. *v.* Ohio, 165 U. S. 194, 222, 17 Sup. Ct. Rep. 305 (1897).

court has gone in sustaining the application of the unit rule to the valuation of property. It would be going still farther to apply the unit rule to a corporation not doing the same kind of business in all the states in which it operates. The cases which require a modification of the unit rule in valuing property, require at the least an analogous modification in valuing a privilege granted to a corporation by one state which is essentially different in respect to the kind of business and its income-producing power than are the privileges granted to the same corporation in other states.

## V

From the foregoing review, it appears that, in the interim between the Baltic Case[182] and the Looney Case,[183] the power of a state to measure excises on foreign corporations by their total capital stock has been considered by the courts of Montana,[184] California,[185] Massachusetts,[186] Tennessee,[187] and Virginia.[188] Only the Montana court saw any impropriety in applying this measure to corporations combining some form of interstate commerce, other than transportation or communication, with the local business which made the corporation subject to the taxing power of the state.[189] By

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[182] Note 8, *supra*.

[183] Note 13, *supra*.

[184] In State *v.* Alderson, note 23, *supra*.

[185] In Albert Pick & Co. *v.* Jordan, note 45, *supra*.

[186] In International Paper Co. *v.* Commonwealth, note 97, *supra*.

[187] In Atlas Power Co. *v.* Goodloe, note 130, *supra*.

[188] In General Ry. Signal Co. *v.* Commonwealth, note 138, *supra*.

[189] The decision of the federal district court of the northern district of Texas in Crane Co. *v.* Looney, 218 Fed. 260 (1914), does not appear to except that court from the above statement. The opinion indicates that the court would have made the Crane Co. pay the Texas tax if it had been based simply on total capital stock, without the inclusion of its surplus and other assets in excess of its authorized capital. In distinguishing the Baltic Case, Judge Meek made no mention of the maximum contained in the Massachusetts statute. The distinction made is as follows:

"The case of the Baltic Mining Company, cited *supra*, was not one in which there was any such necessary relation between the amount of the excise charge and the amount or value of the corporation's property outside of the state or of its interstate or foreign business. The charge imposed by the statute there in question was measured by the amount of the par value of its authorized capital, without regard to the actual value of its assets, whether more or less than that of its nominal capital stock. The charge was not measured by the amount or value of the corporation's assets or the extent of its actual business anywhere or of any kind. The terms of the statute made the charge the same, whether the actual value of the assets of the corporation was more

way of advice to the legislature, the Montana court declared that the statute of that state could not be applied to any foreign corporation engaged in any kind of interstate commerce. It intimated also that it would not help matters to amend the statute and set a reasonable maximum to the annual imposition. In this it clearly misconceived the decision of the Supreme Court in the Baltic Case. The courts of California, Massachusetts, Tennessee, and Virginia went to the opposite extreme, and declared that no maximum was necessary. The supreme court of Idaho [190] took the middle position. In upholding the tax which came before it, it gave as a reason the fact that the Idaho statute provided that no corporation should be required to pay more than $150. It implied that if the maximum were not kept reasonably low, the statute would be invalid.

The California case involved a corporation whose business within the state consisted of local and interstate sales of products manufactured in other states. The similarity between this business and that of the Crane Company in *Looney* v. *Crane Co.*[191] makes it certain that, on writ of error, the judgment of the California court would be reversed by the United States Supreme Court. Whether a similar fate would befall the judgments of the Massachusetts, Tennessee, and Virginia courts would depend upon whether the Supreme Court could be persuaded that excises on foreign corporations engaged in non-commercial activities within the state may be measured in ways that are vain when chosen for corporations engaged exclusively in what the law calls commerce.

The West Virginia statute which came before the federal district court in *Baldwin Tool Works* v. *Blue* [192] adopted the measure of receipts rather than of capital stock. It professed to look only to receipts derived from business done within the state. It did not, however, exclude receipts from interstate commerce carried

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or less than the amount of the par value of its authorized capital stock, and whatever may have been the nature or extent of the business in which it was engaged."

The United States Supreme Court in sustaining the lower court gave no indication that it sanctioned any such distinction, or that it would have decided differently had the Texas statute excluded from consideration all assets in excess of the authorized capital. See 31 HARV. L. REV. 603–04, 614–15.

[190] In Northern Pacific Railway Co. *v.* Gifford, note 69, *supra*.

[191] Note 13, *supra*.

[192] Note 146, *supra*.

on within the state. Such receipts are not taxable directly. They may, however, be made the basis for the valuation of property within the state,[193] or for the assessment of taxes wholly [194] or partially [195] in lieu of taxes on property. On the question whether they may be made the measure of taxes on a privilege extended to a foreign corporation, the Supreme Court has not explicitly declared itself subsequent to its abandonment of its earlier doctrine that privileges within the power of the state to withhold may be taxed as the state may please.

*Looney* v. *Crane Co.*,[196] however, made it clear that a state must show good cause why it should be allowed to measure any tax, other than a property tax, by elements that cannot be levied on directly. The only cause that has been accepted as sufficient for taxes on foreign corporations is the inclusion in the statute of a reasonable maximum.[197] Such a provision really makes the tax a specific one, with a sliding discount in favor of corporations of little capital. Only in the case of such smaller corporations is the tax measured by their total capital stock. If the maximum is no more than the amount which might be imposed as a flat charge on all seeking admission for domestic business, the reference to total capital stock may be regarded as an act of grace towards those who can benefit from it. The sanction given by the Supreme Court to the Massachusetts statute applied in the Baltic Case [198] is grounded on considerations which have no bearing on taxes measured by receipts from interstate commerce, or on taxes measured by total capital stock and imposed on corporations whose interstate commerce is conducted in connection with local manufacturing rather than with local sales.

The Looney Case [199] indicates that the Supreme Court is working towards a more definite rule than any which could be inferred from its earlier decisions following the Western Union Case.[200] That definite rule promises to be one to the effect that only by setting a reasonable limit to its annual imposition may a state measure taxes on foreign corporations engaged partly in interstate

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193 Adams Express Co. *v.* Ohio, note 181, *supra.* On rehearing, 166 U. S. 185, 17 Sup. Ct. 604 (1897).

194 United States Express Co. *v.* Minnesota, note 166, *supra.*

195 Maine *v.* Grand Trunk Railway Co., note 3, *supra*, as interpreted in Galveston, H. & S. A. Ry. Co. *v.* Texas, note 153, *supra.*

196 Note 13, *supra.*

197 Baltic Mining Co. *v.* Massachusetts, note 8, *supra.*

198 Note 8, *supra.*

199 Note 13, *supra.*

200 Note 4, *supra.*

commerce, by any elements that are immune from a direct levy. The only indefiniteness lurking in this definite rule arises from the question of what limits will be regarded as reasonable, and the further question whether the limits may be graduated in accordance with the size of the corporation. There is good reason to believe that the statutes sustained and applied by the federal court in West Virginia, and by the state courts of California, Massachusetts, Tennessee, and Virginia, will be discountenanced by the United States Supreme Court. The states have had clear warning of the risks they run in imposing on foreign corporations excises that seek by indirection to reach the fruits of interstate commerce or to enjoy an increment by reason of property or business in other states.

The possibility that the Supreme Court will disapprove of the state decisions under review suggests interesting questions with respect to the practical operation of our federal system. Until some perservering litigant carries its case from the state court to the federal Supreme Court, the states may continue to do what the Supreme Court would restrain. The law that many foreign corporations live by may be quite different from the law that the Supreme Court would declare. It would be interesting to know how many foreign corporations have paid their taxes under the statutes of California, Massachusetts, Tennessee, Texas, Virginia, and West Virginia, without appealing to the courts for relief. It would be interesting to know how many successful objectors to taxation escape from legitimate demands of the states, because the legitimate demand is inseparable from what is declared invalid. Our method of testing the conformity of state legislation to the requirements of the federal Constitution is often cumbrous in its operation. Successful resistance to state laws often costs more than acquiescence. The expense of settling questions of general public concern has to be borne by individual litigants. The system works well enough for those who are interested only in the evolution of constitutional doctrine. But it is not unthinkable that some day we may devise improvements that will meet the objections which might be raised by those who are concerned primarily with results.

*(To be continued)*

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